S. HRG. 104–103

S. 350, REGULATORY FLEXIBILITY AMENDMENTS ACT OF 1995

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

MARCH 8, 1995

Printed for the use of the Committee on Small Business

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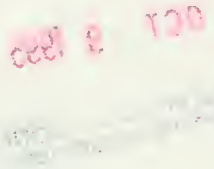

CONTENTS

Opening Statement

Witness Testimony

Alphabetical Listing and Appendix Material Submitted

Comments for the Record

S. 350, REGULATORY FLEXIBILITY AMENDMENTS ACT OF 1995

WEDNESDAY, MARCH 8, 1995

UNITED STATES SENATE,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to notice, at 9:37 a.m., in Room SR–428A, Russell Senate Office Building, Hon. Christopher S. Bond, Chairman of the Committee, presiding.

Present: Senators Bond, Warner, and Wellstone.

OPENING STATEMENT OF THE HONORABLE CHRISTOPHER S. BOND, CHAIRMAN, COMMITTEE ON SMALL BUSINESS, AND A UNITED STATES SENATOR FROM MISSOURI

Chairman BOND. Good morning. The Small Business Committee hearing will come to order. This morning we are going to hear witnesses testifying about the Regulatory Flexibility Amendments Act. I am advised that Senator Bumpers has two additional committee meetings going on, as many of our colleagues do, so we will go ahead and hope that the ranking member and others will be able to join us as the day goes along.

Let me thank all of you for attending this meeting and for your interest in what I think can be a much more important role for small business in the legislative and regulatory process. Today the Committee on Small Business is focusing on a law of critical importance to all small business, the Regulatory Flexibility Act. We will hear testimony from the SBA, GAO, and from the private sector regarding the successes and problems that have arisen in implementing the act over the past 15 years.

We will also discuss potential administrative and judicial remedies that might improve enforcement of the Act. We want to make sure that the requirements of the Act are carried out.

In 1980, when the Reg Flex Act was enacted, it was designed to reduce, where appropriate, the impact of Federal regulations on small business. Under the Act, unless a Federal agency can certify that a proposed regulation will not have a significant impact on a substantial number of small businesses, it must prepare a regulatory flexibility analysis describing the impact and outlining any alternatives to the regulations that were considered during the rulemaking process.

Unfortunately, the original Reg Flex Act does not provide enforcement mechanisms to force agencies to comply with the Act. In fact, the Act even includes a prohibition against judicial reviews of agencies' compliance. As a result, as you might expect, some Fed-

eral agencies have chosen to ignore their obligations under the Reg Flex Act. Agencies routinely certify statements that their regulations will have no impact on small businesses without any thought to the real consequences of their actions. Some Federal regulators apparently have written off small business without a thought given to the lives and the family resources these actions can destroy.

Last month I introduced S. 350, the Regulatory Flexibility Amendments Act of 1995, to allow judicial review of Federal agency compliance with the Reg Flex Act. Under my bill, small businesses would have the opportunity to challenge regulators who attempt to avoid the requirements of the Reg Flex Act. Last week, the House of Representatives, I am pleased to say, passed H.R. 926, the Regulatory Reform and Relief Act, which included a similar judicial review provision.

I would call to my colleagues' attention an analysis recently prepared by the Congressional Budget Office in which it concluded that agencies would need to spend an additional $200,000 per year over the next five years to review proposed regulations and prepare the analyses of their impact on small businesses.

Now that is a sad state of affairs. The requirements under the law are not new. They have been in the law since 1980. Can you think of any clearer statement of the need to strengthen the Reg Flex Act than the CBO's documentation that Federal agencies are falling well short of their duty to comply with these important requirements they are supposed to have been following for the last 15 years. It is clear that they are not doing what Congress told them in 1980 they were supposed to do.

This is why I believe adding judicial review is a necessary step towards assuring small business that its circumstances truly will be considered by regulators as new rules are proposed and adopted. Federal agencies that continue to ignore the law need to know their actions can be reviewed by a Federal judge.

I am also aware that litigating with Federal agencies in the U.S. District Court is expensive and time consuming. I happen to know something about that. It would be wrong for Congress to expect small businesses to be thrilled about the prospect of routinely pursuing the regulators to the courthouse with their hard-earned cash when their time could be better spent growing their businesses.

Therefore, I have asked our witnesses today to include in their testimony any insights into additional administrative procedures or remedies that would bring us closer to 100 percent compliance without having to rely solely on judicial review as the only course. I look forward to hearing the witnesses' ideas and suggestions.

On the first panel I would like to call to testify, first from the SBA, the chief counsel for the Office of Advocacy, Jere Glover; from the General Accounting Office, Johnny C. Finch, the assistant comptroller general in the General Government Division; and I would also like to ask David Voight, the director of the Small Business Center of the United States Chamber of Commerce to join us on the first panel because I understand he has commitments later in the morning that he needs to attend.

With that, Mr. Glover, if you would begin, please.

STATEMENT OF THE HONORABLE JERE W. GLOVER, CHIEF COUNSEL, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Mr. GLOVER. Good morning, Chairman Bond. It is indeed a pleasure to be here this morning to discuss an interest of mine for many, many years, the Regulatory Flexibility Act, and especially the compliance with the Regulatory Flexibility Act.

I have visited with over 10,000 small businesses since being confirmed nine months ago. I attended most of the White House conferences, the majority of them in the various States. The one problem that we hear most clearly from small businesses is the regulatory burden that the Government, both State and Federal, have placed on them. And the one universal solution to that regulatory burden that everyone agrees on is to improve and strengthen the Regulatory Flexibility Act and to provide judicial review.

I think that all of the small business groups universally agree that this is an important thing to do. It is overdue. It should have been done some time ago. I think that the Administration has supported this as well. The Vice President in his NPR review came out for judicial review. I think that an example of how well having an administrator of SBA at the NEC and with Cabinet-level status is the Administration's and the President's support for this.

As you probably know, the only real opponents to judicial review for Regulatory Flexibility Act are the general counsels and the regulators. They, of course, do not like having anyone interfere with their process, and it is always a challenge when we try to resolve those internal disputes.

I am pleased that the President has supported judicial review. It is one of those issues with which SBA administrators have had to go straight to the President to have him come down supportive. As you are well aware, at the end of the last Congress he did send Senator Wallop a letter strongly endorsing judicial review.

With that as a general overall background, what I would like to do today is discuss the efforts that our office has taken to improve compliance during the past nine to 10 months.

Chairman BOND. Mr. Glover, let me just say, I appreciate your giving us the summation. The entire statements of all of our witnesses will be included in the record as if given in full. I think it would be appropriate for you to summarize and hit the high points of the report; the things that you particularly want to call to the attention of the committee in your oral presentation.

Mr. GLOVER. Thank you, sir. Since being sworn in in May of last year we focused a lot of attention on trying to improve compliance with the Regulatory Flexibility Act. One of the first things that I think was provided in the law as a tool for the Office of Advocacy and for small business, but which had not been used by previous chief counsels was the right to file an amicus brief. I instructed the staff to begin looking for cases which are appropriate for filing amicus briefs. We found one. The agency had refused to negotiate with us, had refused to modify their position and had done a very bad regulatory analysis.

We notified the Court of Appeals that we were going to file a brief. Upon filing that notice there suddenly was renewed interest in the negotiation process. Phone calls which had not been re-

turned were promptly returned, and urgently returned. We did negotiate literally up to the last minute. At 8:15 of the night on which we had to file our brief the agency did agree to our suggestions and agreed to modify their regulations which dramatically reduced the burdens on the small cable companies in that particular case.

We have had that same result in notifying the Marine Fisheries about their non-compliance. Let me just say that agency compliance varies widely. Some agencies basically are models. They do basically everything you could ask them to do. Other agencies not only miss the boat, they cannot even find the ocean. They just flat ignore it. They find some technical legal argument they think of and then they go with it.

Most of the agencies are in the middle. They comply occasionally and then they do not comply other times. So you can have a situation when a regulation is very important, or where Congress has established a priority, or Congress had a short timetable put on it, or the issue is the agency's top priority, that is when we find that small business tends to get ignored. So we are dealing with a situation where compliance varies. The only solution that I know of is judicial review.

We have done one other major thing that is important. We entered into letters of agreement, or memorandum of understanding, a more common Government definition, with the Office of Regulatory Affairs and OMB. That agreement provides that we will work together on compliance with the Regulatory Flexibility Act. In half a dozen instances since we began that process we have been able to get OMB to weigh in with the agencies, to encourage them to comply with the Regulatory Flexibility Act.

We have had some regulations which they identified, it looked like they might be a problem, they sent them to us, we have sent them back to them and said, in the pre-publication stage that these were real problems. They have actually stopped those regulations. They still have not seen the light of day.

So the process is improving. But I will tell you, as everyone knows, chief counsels change from time to time, Presidents change, other people change, and there is no guarantee that any of these improvements will be here to protect small business in the future.

But even those improvements we have done are not sufficient. Without judicial review, whenever the stakes are high enough, the agency will tend to ignore us. That is why it is critically important that we have judicial review of compliance with the Regulatory Flexibility Act.

You have introduced a very good bill. Likewise, the House passed a very good bill. The primary concern I have is what the House added to the Regulatory Flexibility Act. When large businesses can invoke judicial review small business becomes a footnote. If they are worried about having the risk analysis done and they have got large firms with large numbers of lawyers on their side of the fight, they are not going to worry about small business.

I would strongly urge that you pass judicial review just to the Regulatory Flexibility Act so we have a clear, freestanding piece of legislation that focuses everyone's attention specifically on those who need it the most, those who the regulatory process puts the greatest burden on, which is the small businesspeople.

Thank you very much.
[The prepared statement of Mr. Glover follows:]

Testimony of

Jere W. Glover

Chief Counsel for Advocacy

United States Small Business Administration

Good morning, Chairman Bond and members of the Committee: It is a pleasure to appear before the Committee on Small Business.[1] The issue before the Committee this morning -- improving agency compliance with the Regulatory Flexibility Act (RFA) is a subject of paramount interest to me. As you know, the Act charges the Chief Counsel with monitoring agency compliance with the RFA. While I have sought ways to improve agency understanding and compliance with the Act, amendments must be made to ensure agencies comply with the requirements to analyze the impact of their rules on small entities.

Support for strengthening the RFA comes from various sources. President Clinton has long supported judicial review of the RFA, and the Vice President's National Performance Review endorsed judicial review early in the administration. Our current Administrator, Philip Lader was the Chief of White House policy for that process. Erskine Bowles, former Administrator and now Deputy Chief of Staff also supported this initiative. The President reiterated his commitment to judicial review in a letter to Senator Malcolm Wallop in the closing days of the last Congress. The initiative also has support from a bipartisan majority of Congress. The 1995 White House Conference on Small Business process is well underway and a number of the state conferences have raised amending the RFA as a method for

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[1] My testimony this morning reflects the independent views of the Chief Counsel for Advocacy and may or may not reflect the views of the Administration.

achieving meaningful regulatory reform and reducing the burdens on small entities.

Having the Administrator of SBA on the National Economic Council with cabinet level status has allowed the voice of small business to be heard. Erskine Bowles' and Phil Lader's strong voices supporting judicial review for the Regulatory Flexibility Act, were essential in winning the President's strong support for this initiative.

The question facing both Congress and the executive branch is how do we minimize these regulatory burdens, provide the underpinnings of vibrant economic growth, and still protect the public from imminent threats to health and safety.

As a preliminary matter, I believe it is critical that the executive branch and the legislative branch work together to solve this problem. Regulations are often imposed as a result of legislation. For example, the Clean Air Act Amendments of 1990[2] and the Cable Consumer Protection and Competition Act of 1992 (Cable Act)[3] both require federal agencies to develop a sheaf of regulations. If Congress passes less burdensome laws to meet its goals and agencies are committed to adopting simplified

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[2] The Clean Air Act Amendments were passed by a bipartisan vote of both chambers and signed into law by President Bush.

[3] The Cable Act was enacted into law over the veto of President Bush by a wide bipartisan margin.

regulations, small business will feel real regulatory relief. When legislation is pending, agencies should be pushed hard during legislative debate to give the real cost of the legislation and implementing regulations on small business.

To say that the problem rests primarily on the shoulders of Congress would be untrue. No doubt exists that federal regulators also need to do a better job of developing sensible regulation and tailoring those rules to both the size of the problem and the size of the enterprise. Regulators must understand that a one-dimensional approach to a multi-dimensional world is inappropriate. Congress recognized early on that regulations do not have the same impact on small and large businesses. The best vehicle for recognizing these distinctions is the RFA and better compliance with the Act by all federal agencies will provide substantive assistance in relieving regulatory burdens on small business.

Let me add that the RFA was designed to help small entities and especially small business. Expanding the analyses contemplated by the RFA to include large businesses will simply make small business problems a footnote in some regulatory analysis. I was glad to see that the House deleted from its RFA bill language that would have permitted judicial review of agency compliance with the RFA by large business. However, the analytical requirements in Title II of the House bill, muddy the clarity of

protections afforded by the RFA to small business. I believe that it is vital to enact, and enact soon, a bill that simply amends the RFA by providing for judicial review. Other issues, such as the requirements of the rulemaking process, should be left to other legislation.

Rational government decisions must be based on sound data filtered through a close analysis of potential alternative actions. The President, in his Executive Order 12,866 (as did predecessors Presidents Reagan and Bush), understands the need for increased analysis before regulating. Strengthening the RFA would further ensure that the government makes sound policy decisions based on appropriate analysis of impacts on the largest segment of regulated entities -- small businesses.

I. The Rational Decisionmaking Process and the RFA

As you are aware, the Administrative Procedure Act (APA) prohibits an agency from taking actions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law...." 5 U.S.C. § 706(2)(A). The courts have interpreted this mandate as requiring an agency to adopt rational rules.

Rational rulemaking presumes that an agency has identified a problem that needs correction.[4] It then accumulates information to determine the severity of the problem and potential corrective actions. After due consideration of various alternatives, the agency publishes a notice in the FEDERAL REGISTER requesting comments from interested parties. The agency considers the comments and issues a final rule responding to the comments and explaining why it took the action that it did.

Congress, in enacting the RFA, mandated that agencies add one further consideration to this process -- the impact of proposed solutions on small entities, including, but not limited to, small business.[5] The RFA is based on two premises: 1) that federal agencies often do not recognize the impact that their rules will have on small businesses; and 2) that small entities are disproportionately disadvantaged by federal regulations compared to their larger counterparts.[6] Thus, rational rulemaking pursuant to the APA must be executed through the filter of the

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[4] For purposes of this discussion, I assume that the agency has the statutory authority to correct the problem but has no specific mandate to address the particular problem. In the case of a specific mandate from Congress (or in rare circumstances the courts), the process outlined will be the same except the legislation will have identified the problem to be corrected.

[5] As the Committee is aware, regulations often impose burdens on small governmental jurisdictions.

[6] This is particularly troubling to small businesses who must compete in the marketplace. Regulatory burdens, by imposing greater increases in the marginal cost of production for small firms, impedes their ability to effectively compete against their larger counterparts.

RFA. It is the job of the Office of Advocacy to monitor, improve and report to Congress on agency compliance.

II. Update on Advocacy Activities

The Office of Advocacy recently released its Annual Report on the Implementation of the Regulatory Flexibility Act.[7] That report provides an excellent summary of problems related to compliance with the RFA. Despite the difficulties outlined in the report, the Office of Advocacy has been aggressive in attempting to obtain improved agency compliance with the RFA.

A. The Letters of Exchange

First and foremost, the Office of Advocacy exchanged letters with the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) (copies of which are attached). These letters commit the Office of Advocacy to provide guidance to agencies in complying with the RFA and to raise concerns to the agency and OIRA. They also commit OIRA to provide us with draft proposed rules upon our request before they are published in the FEDERAL REGISTER and referee any disputes between the Office of Advocacy and the agencies. Sally Katzen, Director of OIRA, should be commended for her eagerness in cooperating to enforce the RFA.

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[7] I expect that the 1994 report to be issued soon.

The letters of exchange arose from OIRA and Advocacy's response to a recommendation from the General Accounting Office to have the two offices work more closely. More importantly, these letters recognize that the Office of Advocacy can be a valuable ally in OMB's efforts to further rationalize agency rulemaking procedures.

Nevertheless, the letters of exchange are not a comprehensive solution to the problem. OIRA's regulatory oversight does not extend to independent regulatory agencies, such as the Federal Communications Commission or the Federal Trade Commission.[8] Nor does OIRA have authority to oversee the regulatory actions of the Agricultural Marketing Service with respect to the implementation of marketing orders.[9] Finally, OIRA's actions under the letters of exchange are voluntary and subsequent heads of OIRA and Advocacy need not abide by the letters of exchange.

More importantly, while Advocacy and OIRA hold sway over regulators, the APA places the final responsibility for deciding

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[8] The Paperwork Reduction Act empowers OIRA to review requests for information collections from all agencies including independent regulatory agencies. However, the independent regulatory agencies can override an OIRA disapproval of an information collection -- a power executive branch agencies do not have.

[9] Appropriations riders enacted for the past ten years have prevented OIRA from expending any monies on oversight of implementation of marketing orders. The Office of Advocacy believes that this rider should be eliminated and OIRA have the authority to exercise its proper oversight of the program.

regulatory issues in the hands of federal judges. Judicial review of the RFA merely extends this principle to rules requiring small business analysis.

The National Federation of Independent Business (NFIB) recommends that the Office of Advocacy be authorized to enter into negotiations with an agency in order to develop less burdensome alternatives. Although the Office of Advocacy currently can undertake such actions and does so, the NFIB proposal would make agency participation mandatory. While I am flattered at the confidence that NFIB shows in the Office of Advocacy, its proposal has some real practical problems. An explication of these problems will demonstrate why judicial review remains the best potential solution to ensure that all agencies comply with the RFA.

First and foremost, the Office of Advocacy does not have the resources needed to conduct such negotiations. And given the current constraints on budgetary resources, the Office is unlikely to obtain these resources in the foreseeable future.[10]

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[10] These same resource constraints also militate against the Office of Advocacy receiving all draft proposed and final rules prior to publication in the FEDERAL REGISTER. In addition, if this authority is given to the Office of Advocacy, either the bill itself or the legislative history must make it clear that silence by the Office of Advocacy does not constitute the Office's concurrence in the certification or regulatory flexibility analysis.

Second, there may not be less burdensome alternatives that are statutorily permitted. In such cases, negotiations would be pointless and would simply delay the issuance of regulations.

Third, the NFIB proposal does not detail how the rulemaking process should be handled if negotiations break down. Should the rulemaking stop? Should OMB or the President intercede? Should the agency go forward but respond to the Office of Advocacy in its preamble to the proposed or final rule?

Fourth, the negotiation process raises serious problems with respect to the operation of independent regulatory bodies, such as the Federal Trade Commission and the Commodity Futures Trading Commission. These agencies are prohibited from making policy decisions, with exceptions not relevant for this discussion, in closed meetings. While the Office of Advocacy can make its ideas known to individual Commissioners, the Commissioners, absent an open meeting, cannot make a decision based on those negotiations. Thus, the type of negotiation contemplated by the NFIB would be impossible unless the Congress wants to return to the days when Commissioners met in secret to hammer out regulatory decisions. Moreover, mandatory intervention by the Office of Advocacy may be construed by a court as a violation of the doctrine of separation of powers.

B. Use of Advocacy's Amicus Authority

Section 612 of the RFA authorizes the Chief Counsel to file amicus briefs in court when another party challenges an agency regulation. It appears that, in appropriate circumstances, even the threat of filing an amicus brief radically alters an agency's consideration of small business problems.

The Office of Advocacy has been involved intimately in the Federal Communications Commission's (FCC) implementation of the Cable Act. At an early stage, the Office of Advocacy recognized the severe impact that the rules would have on small cable operators, most of whom were not the genesis of problems that led to reregulation of the industry. Extensive comments filed by the Office of Advocacy concerning the burdens on small operators were dismissed by the FCC.

In 1994, the Commission finalized its rules on rate regulation. An association of small cable operators intervened in the litigation contesting the validity of the regulations, and in particular, compliance with the RFA and the Small Business Act. I saw this as an opportunity to test the roiling waters of § 612 and filed a notice of intent to file an amicus with the United States Court of Appeals for the District of Columbia Circuit. After the Commission learned of our intention to file an amicus

brief, the Commission led by its General Counsel and head of the Cable Services Bureau, began earnest negotiations with the Office of Advocacy to arrive at a solution to the concerns we raised. After much negotiation, the Office of Advocacy and the Commission developed a satisfactory resolution to our concerns and we agreed not to file the brief.[11]

Our interaction with the National Marine Fisheries Service (NMFS) demonstrates that threats to file an amicus brief, even of a non-imminent variety, can force an agency to improve its compliance with the RFA.

As you may be aware, the North Atlantic fishery, particularly in the Georges Bank, is heavily overfished. NMFS regulates fishing in accordance with the Magnuson Fishery Conservation and Management Act. NMFS recognized that overutilization of the North Atlantic fishery was endangering the long-term viability of the fishery and proposed stringent measures to reduce overfishing.

The Office of Advocacy, after discussion with a variety of affected entities, wrote NMFS requesting that it examine alternatives which may be less burdensome. A follow-up letter

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[11] The Office of Advocacy had to rely on the Commission staff to ensure that the Commissioners would adopt the solution worked out between the staff and the Office of Advocacy. No direct negotiations were held with the Commissioners themselves.

was drafted in which the Office of Advocacy criticized the Service for failure to respond to our previous filings and threatened to intervene in litigation[12] contesting the implementation of the Service's plan to deal with overfishing.

The response, as one might expect, was predictable. The number two lawyer at NMFS requested a meeting with the Office of Advocacy. Staff in the General Counsel's office of the Department of Commerce also contacted us. The Office of Advocacy had detailed discussions which led to modifications in the manner in which NMFS complies with the RFA. In addition, the Office of Advocacy now has an open channel with Commerce Department and NMFS staff to discuss RFA compliance.

The threat of intervention in litigation, while having both shock value and excellent results, is not a general anodyne to agency compliance with the RFA. The Office of Advocacy does not have the resources to intervene in every circumstance in which an agency did not comply with the RFA. Nor would that be an effective strategy with overuse. At some point, agencies would simply tell the Office of Advocacy to go ahead and file and that the agencies do not care.

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[12] The litigation was withdrawn because it became moot due to subsequent and further rapid deterioration of the North Atlantic fishery.

III. Recalcitrant Agencies

A number of federal agencies have historically been less than cooperative in our efforts to obtain compliance with the RFA. This is not an exhaustive discussion. In fact, many agencies, with respect to particular rules, do not, in our estimation, fully comply with the RFA. Yet, the same agencies in other rulemaking activities do fully comply. Thus, it would be impossible to state unequivocally that an agency such as the Department of Interior or the Environmental Protection Agency[13] does or does not comply with the RFA.

Such scorekeeping dramatically misses the point in any event. The purpose of the RFA is to force agencies to recognize the impact of their rules on small entities in every rulemaking. An

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[13] For example, the Office of Advocacy has effectively worked with the Environmental Protection Agency (EPA) to obtain meaningful relief in some but not all instances. The Office of Advocacy effectively used arguments based on the RFA to reduce regulatory burdens faced by small quantity generators of hazardous waste and owners of underground storage tanks. The Office of Advocacy also used the principles elucidated in the RFA to get EPA to reconsider its regulations implementing the Emergency Planning and Community Right-to-Know Act. However, there are circumstances in which the Office of Advocacy questions EPA's analysis, such as with respect to effluent guidelines for placer mines, and EPA rejects our suggestions.

An excellent compilation of EPA's record on compliance with the RFA can be found in Microeconomic Applications, Inc., Henry Beale, Robert Burt, and Kathleen Shaver, *Cost-Effective Regulation by EPA and Small Business Impacts* (1992)(SBA Contract No. SBA-4116-OA-89). The report demonstrates that even within one agency different levels of compliance with the RFA are achieved.

agency can be obsessive about compliance with the RFA for almost all of its rules. However, if it fails to comply with the RFA in promulgating a regulation that has dramatic impact on small business, then its failure more than outweighs its successful implementation in most of the other cases.

The recalcitrant agencies discussed in this section do not miss the boat on compliance with some regulations. They cannot even find the ocean. These agencies place in stark relief the obstinacy that can be developed to avoid compliance with the RFA.

A. The Internal Revenue Service

The history of the Internal Revenue Service's (Service) compliance with the RFA has the been the subject of extensive testimony before various Congressional committees and has been a "lowlight" of the Chief Counsel's annual report. I will not recapitulate those commentaries. Rather, I would like to show why the Service's failure to comply represents such a problem.

The Service proposed regulations that would address perceived abuses by partnerships (Subchapter K entities) in reducing their aggregate tax liability. The proposed rule would apply to all partnerships of which 88% had gross receipts of less than $250,000. The Commissioner proposed to retain the authority to recast any transaction, even one that was valid when completed

and complied with the literal language of the Internal Revenue Code, as abusive. Thus, no small partnership would ever have any certainty with respect to future transactions or, more importantly, past transactions.[14]

It is beyond cavil by all parties, other than the Service, that the rule would have a significant economic impact on a substantial number of small entities. Despite this patent effect on small business, the Service did not perform a regulatory flexibility analysis; rather, the Service resorted to its typical course of considering the regulations as merely interpretative and therefore not within the ambit of the RFA.

B. Procurement Agencies

As a general proposition, the APA excludes matters relating to government contracts from the requirements of notice and comment rulemaking. This gap had been used by agencies until 1984 to avoid the administrative process when Congress required that all significant federal contracting regulations be subjected to

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[14] After further negotiations between my office and the Service, it altered some aspects of the anti-abuse rules to make it more evident that normal partnership dealings were not the focus of the Service's regulation. Nevertheless, the Service still maintained that it need not comply with the RFA. A subsequent Commissioner of the Internal Revenue may be less willing to accept the reasoning of the Office of Advocacy. Unless the Service is subjected to judicial review of its compliance with the RFA, it is unlikely that it would voluntarily seek out less burdensome alternatives when crafting regulations.

notice and comment rulemaking. As a result, the major procurement agencies, such as the Department of Defense and the General Services Administration, had to comply with the RFA. Unfortunately their compliance has not been satisfactory. A brief review of current activities will demonstrate the problems facing small business as a result of the failure to fully grasp compliance with the RFA.

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration published a proposed rule to implement various small business provisions of the Federal Acquisition Streamlining Act. The proposed rules would have a significant economic effect on all small businesses wishing to do business with the federal government. Nevertheless, these agencies failed to perform an initial regulatory flexibility analysis because the rules would be beneficial to small business. Nothing in the RFA permits an agency to avoid its obligations under the Act because the proposals may be beneficial to small business[15] and was advanced to these agencies in our formal comments.

Administrator Lader also raised the issue of RFA compliance and the need to cooperate with the Office of Advocacy. As a result of the Administrator's actions, we have been assured of future

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[15] A more detailed discussion of this issue can be found in the 1993 Annual Report and to repeat it here in detail is unnecessary.

compliance with the RFA in procurement matters. However, those promises may prove to be illusory.

In another matter, this one concerning rules for ownership of technical data, the Department of Defense has refused to perform an adequate regulatory flexibility analysis. A meeting was held to discuss this issue but did not resolve the matter and another meeting was cancelled by the Department. I cannot say that I am sanguine about our chances of persuading the Department to do the analysis given the Department's history.

C. The Agricultural Marketing Service

Problems with the Agricultural Marketing Service's (AMS) compliance with the RFA has been an issue before Congress on more than one occasion. I wish I could say that Congressional pressure seriously modified the behavior of the AMS. It did not. A fuller explanation of the problems the Office of Advocacy has with AMS can be found in this year's annual report and the Acting Chief Counsel's testimony before the House Judiciary's Subcommittee on Administrative Law Subcommittee in 1993. I will not reiterate those remarks. However, I will share one anecdote which demonstrates the serious problems my office faces in trying to obtain compliance with the RFA.[16]

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[16] AMS regulates, by use of marketing orders, the shipment of billions of dollars of milk, fruits, vegetables, and specialty (continued...)

My office has written to AMS on numerous occasions contesting their implementation of the RFA. My staff has had discussions with various staff members of AMS and submitted a detail memorandum to the Administrator's special assistant concerning AMS compliance. Finally, after repeated contacts, the Administrator agreed to meet with me and members of my staff stating "AMS certainly has no desire or intention to ... fail to comply with ... the RFA." Letter of November 8, 1994 from Administrator Hatamiya to Chief Counsel Jere W. Glover. A meeting was scheduled for December 20, 1994 but was cancelled by the Administrator. Further attempts to reschedule a meeting with the Administrator finally resulted in a meeting on February 13, 1995 which was pleasant but resulted only in vague promises by the Service to improve its compliance with the RFA. No further meetings have been scheduled and the most recent issuances from the AMS continue to demonstrate a continuing disregard for the RFA.

The only way to ensure that each rulemaking from every agency complies with both the letter and spirit of the RFA is to make sure that an agency pays a "penalty" for failing to comply with the RFA. The best mechanism for doing that is through judicial review.

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[16](...continued)
crops. Thus, its failure to comply with the RFA affects a not insubstantial portion of the agricultural markets in the United States.

IV. Judicial Review of RFA Decisions

As you are well aware, an agency's failure to comply with the RFA is not directly contestable in court. Thus, the RFA differs markedly from all other statutes that dictate the process for arriving at agency decisions. This allows federal agencies, as the annual reports have shown, to ignore compliance with the RFA with impunity. The best mechanism is the threat of litigation over agency compliance with the RFA.

As I have demonstrated, the mere potential entrance by the Office of Advocacy in litigation through its amicus authority led the FCC and the NMFS to modify their regulations and procedures for complying with the RFA. A more substantial and ongoing threat, potential judicial review of agency compliance with the RFA, would certainly lead to scrupulous compliance with the RFA, just as similar attentiveness is paid to the impact statement requirements of the National Environmental Policy Act (NEPA).

Historically, the gravest opponents of judicial review have been federal agencies. Rather than viewing the RFA as a beneficial tool, they find it akin to the albatross that figuratively hung around the neck of the Ancient Mariner. The agencies are concerned that this might lead to a barrage of lawsuits and are concerned that full compliance will slow the process of regulatory development.

Congress enacted the APA to force agencies to draft regulations only after acquiring hard facts or data concerning the problem to be addressed. Failure to acquire these facts or data, which can come to light as a result of performing a regulatory flexibility analysis, should be a telltale sign to the agency that it should stop and reexamine the problem before heading forward with a particular solution. Compliance with the RFA slows down the rulemaking process only where the agency has not done a proper analysis as mandated by the APA and collected the appropriate data needed to analyze various options to the proposed rule.[17] If compliance with the RFA demonstrates that an agency does not have the support needed to implement a particular regulatory initiative -- so be it.

The fears of judicial review are overstated. Unlike NEPA, interlocutory review of agency compliance with the RFA could not occur because no final agency action has occurred until the agency publishes its final rule. Action prior to that would be prohibited by the courts for failure to exhaust administrative remedies. Second, the cost of litigation would be so large that small businesses would use the provision only to contest the most

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[17] The FCC's implementation of the Cable Act demonstrates the folly of trying to develop a regulatory scheme within a short time frame. However, in that circumstance, the FCC was trying to comply with statutory deadlines issued by Congress. Still it took nearly a year and numerous reconsiderations to finalize rate regulations, at least for large cable operators. Small operator rules are still in flux because the FCC has not accumulated the needed data to finalize them. Most small operators function using regulations aimed at large operators.

egregious agency actions. Third, given the current method for challenging final rules, most complaints about RFA compliance would be brought as a separate claim in a challenge to agency rulemaking pursuant to the APA. Thus, the number of potential lawsuits challenging agency regulations would not be much greater than they are today. What would change is the likelihood of success in court because it is far easier to demonstrate that an agency failed to comply with proper procedures than demonstrate that the solution ultimately chosen by the agency is arbitrary and capricious. Of course agencies could avoid that pitfall through full compliance with the RFA. Thus, judicial review provides agencies with a significant incentive to comply fully with the RFA -- something they do not have today.

V. Amending the RFA

I believe that the posture I have taken since arriving at the Office of Advocacy has been consistent. I am more committed to judicial review than the exact language of a bill. In that regard, I believe that the provisions in the bill recently passed by the House and the bill introduced by Chairman Bond in the Senate would accomplish the primary objective of obtaining judicial scrutiny. Similarly, I believe that various versions of amendments to the RFA floated by the Administration and others also would achieve that goal.

If the language of the House bill or your bill can be improved--fine--but let's get an independent bill passed as soon as possible so that the Office of Advocacy can turn its attention to ensuring that agencies comply with the RFA. However, I am concerned with any provision that may allow large businesses to come within the zone of interest protected by the RFA. We often find that large firms like government regulations because they raise the barriers to entry and prevent small firms from competing with them.[18]

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[18] Any bill which extends the principles of the RFA to all businesses is counterproductive to the purposes of the RFA.

The RFA was enacted with the recognition that small businesses face special problems with respect to complying with the federal regulations. Requiring all regulatory flexibility analyses to examine the costs of compliance for all businesses defeats the purposes of the RFA. Any language that distracts agencies from this issue eliminates the distinction between large and small business -- a distinction which I believe still validly exists.

In addition, the inclusion of other businesses within the RFA or requiring a similar analysis for all businesses in whatever form may allow any business to sue under the RFA not just small businesses. Any entity would come within the zone of interests protected by the RFA and would thus be eligible to sue an agency for failure to comply with the RFA. *Compare* Clarke v. Securities Indus. Ass'n, 487 U.S. 388, 399-400 (1987) (outlining the zone of interest test for standing to challenge an agency action).

Little doubt exists that expanding the universe of entities eligible to sue under the RFA would increase the likelihood that federal agencies would comply with the tenets of the Act. However, the ability of large entities to sue could result in shifting costs to small businesses or otherwise impairing their competitive advantage.

Prior to the enactment of the Clean Air Act, which legislatively resolved the dispute, EPA was considering two methods for controlling volatile organic compounds (VOCs) from

(continued...)

VI. Conclusion

In 1946, Congress took a giant step forward by standardizing the decisionmaking process used by federal agencies. That Congress and subsequent court decisions demanded that agencies exercise their rulemaking authority in a rational manner. In 1980, Congress recognized that the concerns of small entities, the largest segment of the regulated community in terms of sheer number, were being ignored in the rulemaking process. Congress determined that without appropriate consideration of their concerns rational rulemaking could not occur. However, for whatever reason, that Congress decided not to provide the necessary teeth to force federal agencies to take small entity concerns into consideration when promulgating regulations.

I believe that the time is appropriate to take the necessary steps to force such compliance. Jawboning by my office and OIRA and the issuance of executive orders by three Presidents, while

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[18](...continued)
automobiles. One would require additional components on automobiles and the other would have required modification of pumps by gasoline retailers. If EPA had chosen to require automobile manufacturers to control VOCs and the H.R. 9 version of the RFA had been in effect, the automobile manufacturers could have contested agency compliance with the RFA. The end-result may have been the imposition of that requirement on small businesses -- gasoline service stations. The authors of the RFA did not intend such an anomalous result. I do not believe that the RFA should be used as a tool by large businesses to increase their competitive advantage over small businesses or shift their costs to small businesses through litigation.

sometimes successful, has not guaranteed compliance and certainly do not effectively address the problems posed by independent agencies' regulations. Only the threat of judicial scrutiny will ensure that agencies will comply with the letter and spirit of the RFA. Even judicial scrutiny will not resolve all regulatory burdens faced by small business until Congress applies the principles of the RFA when it enacts legislation.

I am pleased to answer any questions the Committee may have.

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Chairman BOND. Thank you, Mr. Glover.
Mr. Finch.

STATEMENT OF JOHNNY C. FINCH, ASSISTANT COMPTROLLER GENERAL, GENERAL GOVERNMENT DIVISION, U.S. GENERAL ACCOUNTING OFFICE

Mr. FINCH. Thank you, Mr. Chairman. I am pleased to be here today to discuss our April 1994 report on agencies' compliance with the Regulatory Flexibility Act of 1980. I will briefly summarize our major conclusions, recommendations, and matters for congressional consideration that we made in that report, and discuss some actions that have been taken since the report was issued.

The Chief Counsel for Advocacy of SBA is required to monitor and report at least annually on agency compliance with the Regulatory Flexibility Act. In conducting our study for the April 1994 report we reviewed the 12 SBA annual reports available at the time of our review to determine SBA's assessment of agencies' compliance. We did not make an independent determination of agencies' compliance with the act; we relied on SBA's assessment.

The SBA annual reports indicated that agencies' compliance with the act has varied widely from one agency to another. Some agencies, such as the Internal Revenue Service, were repeatedly regarded by SBA as failing to comply with the act. On the other hand, SBA said agencies such as the Environmental Protection Agency had exemplary compliance records. Still other agencies compliance reportedly varied over time or varied by subagency.

The SBA reports indicated a variety of reasons why certain agencies have failed to comply with the act. The report said that some agencies, such as IRS, did not consider the act applicable to their regulations and therefore did not perform the analyses that the act prescribes. SBA said other agencies, such as the Agricultural Marketing Service, erroneously certified that their rules did not have a significant economic impact on a substantial number of small entities. Still other agencies accepted the fact that the Regulatory Flexibility Act applied to their rules and that they affected small entities, but reportedly still did not fully comply with either the letter or intent of the law.

We also reviewed SBA's 1992 survey of agencies' compliance with Section 610 of Title V of the code, which required each agency to publish, by mid-1981, a plan for the periodic review of its rules that "have or will have a significant economic impact upon a substantial number of small entities." Of the 83 Federal organizations surveyed, 55 responded. Of these 13, or 24 percent, stated that they had published the required plan for review of their rules. Most of the remaining respondents indicated that their agencies were not required to publish a plan because none of their regulations had a significant economic impact on a substantial number of small entities.

We concluded that there were several reasons for agencies apparent lack of compliance with the Act. One, the Act does not expressly authorize SBA or any other entity to interpret key statutory provisions such as significant economic impact or substantial number of small entities. Two, the Act does not require SBA or any other entity to develop criteria for agencies to follow in reviewing

their rules. Three, in the absence of this express authority or requirement, no guidance has been issued to Federal agencies defining key statutory provisions. And four, the Act does not authorize SBA or any other entity to compel rulemaking agencies to comply with its provisions.

We also concluded that the Office of Management and Budget could help ensure certain rulemaking agencies compliance with the Act by reviewing and commenting on those agencies significant regulatory actions pursuant to its responsibilities under Executive Order 12866. OMB can return most regulatory actions to agencies for further consideration if it believes the actions are inconsistent with the Act.

However, OMB's authority to play an enforcement role has been limited in several respects. Under the executive order, OMB cannot review rules proposed by independent regulatory agencies. For the past several years, language in OMB's appropriation has prevented it from reviewing agricultural marketing orders from the Agricultural Marketing Service. Also, OMB did not have established criteria or procedures to determine whether agencies have complied with the Act. Finally, OMB's ability to ensure agencies' Regulatory Flexibility Act compliance have been diminished because it was often unaware of SBA's concerns regarding an agency's compliance.

In our report, we said that if Congress wishes to strengthen the implementation of the act it should consider amending the Act to (1) provide SBA with clearer authority and responsibility to interpret the Act's provisions and (2) require SBA in consultation with OMB to develop criteria as to whether and how Federal agencies should conduct Regulatory Flexibility Act analyses. We said Congress could also consider focusing its oversight of the Act on the independent regulatory agencies and agricultural marketing orders over which OMB's review and comment authority is limited.

In terms of agency's actions, we recommended that the OMB director, in consultation with SBA, establish procedures OMB can use to determine agencies' compliance with the Act. We said that these procedures should be incorporated into OMB's processes for reviewing regulations both before they are published for notice and comment and before they are published in final. We also recommended that SBA send OMB a copy of any written notification of Regulatory Flexibility Act non-compliance that the chief counsel sends to an agency.

SBA and OMB agreed with our recommendations and have taken some actions. On January 11, 1995—and Mr. Glover just referred to this in his statement—the SBA Chief Counsel for Advocacy and the Administrator of OMB's Office of Information and Regulatory Affairs exchanged letters that commit the two offices to work together more closely in enforcing the Regulatory Flexibility Act.

While these actions are commendable and truly are positive steps, congressional action is still needed to clarify statutory authority, in this area. Without clear statutory authority, rulemaking agencies may question the basis upon which voluntary guidance is issued. Congressional action in these areas would reinforce the voluntary actions OMB and SBA have taken. Congress could also improve compliance by focusing its oversight of the Act on the inde-

pendent regulatory agencies and the agricultural marketing orders over which OMB's review and comment authority is limited.

Mr. Chairman, this concludes my statement. I would be pleased to respond to questions.

[The prepared statement of Mr. Finch follows:]

Statement of Johnny C. Finch
Assistant Comptroller General
General Government Division

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss our April 1994 report on agencies' compliance with the Regulatory Flexibility Act of 1980.[1] In my testimony today, I will briefly summarize our major conclusions, recommendations, and matters for congressional consideration in that report and discuss actions taken since the report was issued.

The Regulatory Flexibility Act requires federal agencies to assess the effects of their proposed rules on small entities. As a result of their assessment, an agency must either (1) perform a regulatory flexibility analysis describing the impact of the proposed rule on small entities or (2) certify that the rule will not have a "significant economic impact on a substantial number of small entities." However, the act does not define what is meant by the terms "significant economic impact" or "substantial number." The agency's regulatory flexibility analysis must indicate the objectives of the rule and its projected reporting, recordkeeping, and other compliance requirements. The agency must also consider alternatives to the proposal that will accomplish the agency's objectives while minimizing the impact on small entities.

The SBA Chief Counsel for Advocacy is required to monitor and report at least annually on agency compliance with the Regulatory Flexibility Act. In conducting our study for the April 1994 report, we reviewed the 12 SBA annual reports available at the time of our review (for the years 1980 through 1992) to determine SBA's assessment of agencies' compliance. We did not make an independent determination of agencies' Regulatory Flexibility Act compliance.

SBA REPORTS INDICATE VARIABLE
AGENCY COMPLIANCE WITH THE ACT

The SBA annual reports indicated agencies' compliance with the Regulatory Flexibility Act has varied widely from one agency to another. Some agencies, such as the Internal Revenue Service (IRS), were repeatedly regarded by SBA as failing to comply with the act. On the other hand, SBA said agencies such as the Environmental Protection Agency had exemplary compliance records during this 12-year period. Still other agencies' compliance reportedly varied over time or varied by subagency.

The SBA reports indicated a variety of reasons why certain agencies have failed to comply with the Regulatory Flexibility Act. The reports said that some agencies did not consider the act applicable to their regulations, and therefore did not

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[1]Regulatory Flexibility Act: Status of Agencies' Compliance (GAO/GGD-94-105, Apr. 27, 1994).

perform the analyses that the act prescribes. For example, IRS has consistently considered the vast majority of its rules to be "interpretative," and therefore not subject to the requirements of the act. IRS also said that its notices, revenue rulings, and revenue procedures or circulars were "pronouncements," not "rules," and therefore were not subject to the Regulatory Flexibility Act's requirements. SBA said these "interpretative" rules and "pronouncements" had a substantial effect on small entities, and said IRS had "avoided its responsibilities to consider the impact of its rules on small businesses."

SBA said other agencies erroneously certified that their rules did not have a significant economic impact on a substantial number of small entities. For example, the SBA report for 1992 concluded that certifications the Agricultural Marketing Service issued regarding its marketing orders and rules were "boilerplate certifications representing nothing more than a post hoc rationalization for actions that the Service wants to take." The report said the Service's "lack of compliance demonstrates a cavalier disregard of the analytical requirements of the (act)," and that its certifications "are a model of conclusory findings supported by little or no analysis."

Still other agencies accepted the fact that the Regulatory Flexibility Act applied to their rules and that they affected small entities, but reportedly still did not fully comply with either the letter or intent of the law. The SBA Chief Counsel testified in a hearing before the Senate Governmental Affairs Committee in 1988 that about half of the Office of Advocacy's time is spent trying to convince agencies to go further in their analysis of regulatory impact or to make the regulatory decision more flexible.

SBA SURVEY SHOWED MANY AGENCIES HAD NOT PLANNED FOR OR CONDUCTED REVIEW OF RULES

We also reviewed SBA's survey of agencies' compliance with Section 610 of Title 5 of the U.S. Code, which required each agency to publish, by mid-1981, a plan for the periodic review of its rules that "have or will have a significant economic impact upon a substantial number of small entities." All such rules in effect on January 1, 1981, were to be reviewed within 10 years of that date. The plan was also required to provide for the review of all rules adopted after that date within 10 years of their publication as a final rule. In reviewing their rules, agencies were required to consider such factors as the continued need for the rule, its complexity, and any complaints or comments from the public.

In April and May 1992, the Chief Counsel for Advocacy sent letters to the heads of all 14 executive departments and at least 69 other federal organizations requesting that they furnish a

copy of their original periodic review plan and any amendments. At least 55 executive departments and other federal organizations responded to the Chief Counsel's request. Of these, 13 (24 percent) stated that they had published the required plan for the review of their rules. Most of the remaining respondents indicated that their agencies were not required to publish a plan because none of their regulations had a significant economic impact on a substantial number of small entities.

CONCLUSIONS

In our April 1994 report, we concluded that there were several reasons for agencies' apparent lack of compliance with the Regulatory Flexibility Act: (1) the act does not expressly authorize SBA or any other entity to interpret key statutory provisions such as "significant economic impact" or "substantial number of small entities;" (2) the act does not require SBA or any other entity to develop criteria for agencies to follow in reviewing their rules; (3) in the absence of this express authority or requirement, no guidance has been issued to federal agencies defining key statutory provisions;[2] and (4) the act does not authorize SBA or any other entity to compel rulemaking agencies to comply with its provisions.

We also concluded that the Office of Management and Budget (OMB) could help ensure certain rulemaking agencies' compliance with the Regulatory Flexibility Act by reviewing and commenting on those agencies' significant regulatory actions pursuant to its responsibilities under Executive Order 12866. A rulemaking agency covered by the executive order must submit any significant regulatory action to OMB before publication of the rule for notice and comment and before final publication. OMB can return most regulatory actions to agencies for further consideration if it believes the actions are inconsistent with the Regulatory Flexibility Act.

However, we found that OMB's authority to play an enforcement role was limited in several respects. Under the executive order, OMB cannot review rules proposed by independent regulatory agencies. For the past several years, language in OMB's appropriation has prevented it from reviewing agricultural marketing orders from the Agricultural Marketing Service. Also, OMB did not have established criteria or procedures to determine

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[2]By requiring the Chief Counsel to monitor compliance with the Regulatory Flexibility Act, SBA is presumably permitted to at least provide agencies with nonbinding guidance on how it believes the act should be implemented. SBA issued some general guidance in 1981, but did not attempt to define terms in the statute. SBA has not issued any further guidance on the act's compliance since 1981.

whether agencies have complied with the Regulatory Flexibility Act. Finally, while SBA reportedly notified rulemaking agencies in writing of its Regulatory Flexibility Act concerns during the rulemaking notice and comment period, it did not normally provide OMB with a copy of those concerns and only occasionally telephoned OMB about SBA's compliance concerns. Therefore, OMB's ability to ensure agencies' Regulatory Flexibility Act compliance was diminished because it was often unaware of SBA's concerns regarding an agency's compliance.

MATTERS FOR CONGRESSIONAL CONSIDERATION

We said that, if Congress wishes to strengthen the implementation of the Regulatory Flexibility Act, it should consider amending the act to (1) provide SBA with clearer authority and responsibility to interpret the Regulatory Flexibility Act's provisions and (2) require SBA, in consultation with OMB, to develop criteria as to whether and how federal agencies should conduct Regulatory Flexibility Act analyses. We said Congress could also consider focusing its Regulatory Flexibility Act oversight on the independent regulatory agencies and agricultural marketing orders over which OMB's review and comment authority is limited.

RECOMMENDATIONS FOR AGENCY ACTIONS

We recommended that the OMB Director, in consultation with SBA, establish procedures OMB can use to determine agencies' compliance with the Regulatory Flexibility Act. We said that these procedures should be incorporated into OMB's processes for reviewing regulations before they are published for notice and comment and before they are published in final. We also recommended that the SBA Administrator direct the SBA Chief Counsel for Advocacy to send OMB a copy of any written notification of Regulatory Flexibility Act noncompliance the Chief Counsel sends to an agency.

OMB AND SBA HAVE TAKEN SOME ACTIONS

SBA and OMB agreed with our recommendations and have taken some actions. On January 11, 1995, the SBA Chief Counsel for Advocacy and the Administrator of OMB's Office of Information and Regulatory Affairs (OIRA) exchanged letters that commit the two offices to work together more closely in enforcing the Regulatory Flexibility Act. Specifically, SBA said it would develop guidance for agencies to follow in complying with the act, and OIRA offered its assistance in developing that guidance. OIRA said it would consider whether an agency should have prepared a regulatory flexibility analysis in its review of the agency's notice of proposed rulemaking. If it appears that the agency should have done so, OIRA said it would include SBA in the review process. OIRA also asked SBA to let OIRA know of any concerns

regarding the need for a flexibility analysis or the adequacy of any analysis. Finally, SBA said it would provide OIRA with a copy of any correspondence or comments it files with an agency concerning compliance with the act.

While these actions are commendable, congressional action is still needed to clarify statutory authority in this area. Specifically, the act does not expressly authorize SBA or any other entity to interpret key provisions in the statute and does not require SBA or any other entity to develop criteria for agencies to follow in reviewing their rules. Without clear statutory authority, rulemaking agencies may question the basis under which voluntary guidance is issued.

In commenting on our report's recommendations, the SBA Chief Counsel for Advocacy said SBA would welcome clarification of its authority to interpret Regulatory Flexibility Act provisions. OMB said it had no objection to any changes in the statute or in the rulemaking process that would strengthen its position in ensuring compliance with the act. Congressional action in these areas would reinforce the voluntary actions OMB and SBA have taken. Congress could also improve compliance by focusing its Regulatory Flexibility Act oversight on the independent regulatory agencies and agricultural marketing orders over which OMB's review and comment authority is limited.

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Mr. Chairman, this concludes my prepared statement. We will be pleased to answer any questions.

Chairman BOND. Thank you very much, Mr. Finch.
Mr. Voight.

STATEMENT OF DAVID VOIGHT, DIRECTOR OF THE SMALL BUSINESS CENTER, UNITED STATES CHAMBER OF COMMERCE

Mr. VOIGHT. Thank you, Mr. Chairman. Like your colleagues, I too have a scheduling problem. I very much appreciate your accommodating my need.

I am David Voight. I am director of the Small Business Center at the U.S. Chamber of Commerce and we are extremely pleased to have the opportunity to reiterate our support for your bill, S. 350. The support and enthusiasm for the regulatory flexibility concept is not new to the chamber. We strongly supported the original bill in 1980 and we strongly supported reform during the last Congress. I personally had a lot of involvement in 1980 when I was at SBA, and I am still co-chairman of the Regulatory Flexibility Act Coalition.

I do not think I need to talk to this Committee about why small business is so important to our economy and why we need to have a strong and effective Regulatory Flexibility Act. So I want to move directly to the questions you asked in your letter of invitation: what are the problems we are encountering with the RFA, and what are some possible solutions to them.

The underlying concept of the Regulatory Flexibility Act, of course, is a very sound one. It is a good and worthwhile law, but one that has some fundamental flaws, some of which you noted in your introductory remarks and some of which were noted in the GAO report as well. For example, the lack of uniform guidelines for agencies results in wildly inconsistent compliance among different agencies. And of course, the fact that agencies do not have to respond to any compelling authority leads to easy non-compliance. This, of course, is the issue of judicial review.

There are other questions, as the GAO report mentioned in regard to definitions such as what is a significant economic impact on a substantial number of small entities. We saw that, for example, in the Family Medical Leave Act of the last Congress where the Department of Labor devoted simply 25 lines to the Regulatory Flexibility Act and concluded that in fact there was no significant number of small businesses affected because the law exempted 50 or fewer employees. I think we all know that there are many small businesses that have more than 50 employees.

The SBA guidance, for example, as a rough rule of thumb suggests that as many as 500 employees can still constitute a small business. So that the Department of Labor, again, typically took an easy way out. They may have been perhaps technically in some sense in compliance, but certainly missed the essence of the concept of the law with helping small businesses.

Likewise, the famous interpretive rule leaves a big loophole frequently abused by the IRS in particular. Under this concept, rules that are considered interpretive; that is to say, specifically directed by Congress, are considered exempt. IRS considers all of their rules interpretive and, therefore, in effect have given themselves a blanket exemption from the Regulatory Flexibility Act despite the fact that the IRS is probably the single agency that impacts on most

small businesses. Many sector-specific industries might miss EPA oversight, or miss FDA oversight, but everyone pays taxes.

Chairman BOND. If they are profitable.

Mr. VOIGHT. You file forms even if you are not. So you cannot miss IRS and they have very conveniently exempted themselves from it.

So all this suggests there are some broad areas of reform that are necessary, again some of which were mentioned in the GAO report. For example, I think again SBA, perhaps particularly the Office of Advocacy, should have broader authority to establish uniform guidelines which agencies could follow. This is a tool that EPA already uses in seeking compliance with some of their proposals. And the Office of Advocacy already has a major role to play. Perhaps they could both assure easier compliance and more sensible rulemaking if they could seek uniform guidelines that could be presumptively in compliance with the Act.

Likewise, judicial review—I know that is not an area you want to spend a lot of time discussing today—is absolutely the core issue. We have to have some form of meaningful judicial review so the agencies do know that they are at risk if they do fail to carry out the intent of the law.

The legislation that the House passed, H.R. 926 also has a section entitled, rules commented on by SBA Chief Counsel for Advocacy. The essence of this proposal is that agencies would be requested to submit prior notification to the Office of Advocacy before they published their proposed rulemaking. This would give the Office of Advocacy 30 days to comment. Then when the rules are published the comments could be published as well along with the agency response to them. This would assure some small business input in a timely manner.

This I think is probably a good idea, but I would like to raise a very major caveat in that it is very easy for Congress to increase the responsibilities of agencies without necessarily giving them more resources to do it. If somehow in requesting the Office of Advocacy to comment without giving them resources to comment in fact, and then if one went on and presumed that failure to comment, which they simply could not do because of lack of resources, was approval, you might make the situation worse instead of better. If you had some provision like this, which is probably a pretty good idea, I think it should have clear language stating that failure to comment is not presumptively considered approval.

Mr. Glover also mentioned the amicus provisions. H.R. 926 has a sense of Congress resolution reaffirming the sense of Congress that the Office of Advocacy should have amicus authority. I think there is no reason not to do this. Amicus, of course, is friend of the court. In this case I think the Office of Advocacy would be friend of small business. I see no reason why the Office of Advocacy could not go to court and bring to the court's attention the particular concerns of small business. I am delighted to hear Mr. Glover say that they are interested in pursuing a viable case that would do this.

Last Congress saw us tantalizingly close to enactment of reg flex reform. We are, of course, extremely excited that this year has even more momentum. We applaud your leadership and efforts in this

regard and look forward to working with you in moving to achieve this objective. Thank you very much.

[The prepared statement of Mr. Voight follows:]

STATEMENT
on
THE REGULATORY FLEXIBILITY AMENDMENTS ACT OF 1995
before the
SENATE COMMITTEE ON SMALL BUSINESS
for the
U.S. CHAMBER OF COMMERCE
by
DAVID VOIGHT
Director, Small Business Center
March 8, 1995

Mr. Chairman and members of the Committee, I am David Voight, Director of the Small Business Center for the U.S. Chamber of Commerce. The Chamber represents more than 215,000 business members, 96% of which have fewer than 100 employees, and 70% of which have fewer than 10 employees. In addition, we represent more than 3,000 state and local chambers of commerce, 1,200 trade and professional associations, and 72 American Chambers of Commerce abroad. Clearly, small businesses are the backbone of our membership, and on their behalf, we are delighted to appear before the Senate Small Business Committee.

We are especially pleased to have the opportunity to reiterate our support for your bill, S. 350, the "Regulatory Flexibility Amendments Act of 1995." Small businesses have borne the brunt of the cumulative impact of unreasonable and costly federal mandates for far too long. Given their importance to our struggling economy, we must ensure not just their survival, but their growth as well. That is what this issue is all about.

The Chamber has long been at the forefront of the regulatory flexibility issue. We were strong supporters of the original Regulatory Flexibility Act of 1980 (RFA), and have been working to strengthen the law for several years. Indeed, I co-chair the Regulatory Flexibility Act Coalition. Both the Coalition and the Chamber worked closely with Senator Wallop in the last Congress when he successfully amended S.4, the National Competitiveness Act, to include essential changes to the RFA. Unfortunately, the underlying bill did not get

through the conference. We have also worked closely with leaders in the House of Representatives on this issue, and applaud the successful effort to pass meaningful reform last week by an overwhelming vote of 415-15.

Surely this Committee, of all Committees, does not need a lot of statistics on the importance of small business to our economy in order to understand the underpinning for this whole concept. Therefore, I will jump directly to the core of the two issues you asked to have addressed today—the successes and problems of the RFA, and solutions for a more effective law.

The RFA was designed to provide the small business community respite from the ever-growing hindrance of excessive regulation. It lays out a multi-step process that, if followed, would avoid imposing much of the excessive regulatory burdens that small businesses face today. Federal agencies are directed to assess the cost of compliance to small businesses and other small entities, genuinely consider alternative, cheaper ways to achieve the same goal, and either adopt the more cost-effective substitute or justify their reasons for rejecting it. It is a praiseworthy law with some fundamental flaws. Agencies do not have uniform guidelines to follow for complying with the RFA, rendering compliance inconsistent among the agencies. Agencies also do not have to answer to any compelling authority for noncompliance. The RFA specifically excluded the courts as reviewers in the interest of prompt execution. These deficiencies in the process have led to flagrant bureaucratic abuses of the RFA.

The RFA allows agencies to forego an analysis if the regulation in question will not have a "significant economic impact on a substantial number of small entities." This provision has become a loophole by which agencies wrongly circumvent this crucial step. Often, they develop inaccurate conclusions to shirk their responsibilities and do little to justify those conclusions. The Family Medical Leave Act (FMLA) is an example. In the 91 pages of FMLA regulations, the Department of Labor devoted 25 lines to its scant regulatory

flexibility considerations:

> The Department has determined that such an analysis is not required for this rulemaking. This conclusion is based on the fact that FMLA only covers private employers of 50 or more employees, and public agencies. Small entities, i.e., employers with fewer than 50 employees, are exempt.[1]

Clearly, many genuine small businesses have more than 50 employees.

Bureaucratic abuse of the RFA assumes other forms as well. The RFA exempted what it calls "interpretive rules" from analysis. Interpretive rules are those which are delegated by Congress to the appropriate agency with specific instructions. The rationale behind the exemption was that the agencies had little or no discretion in the rulemaking—their instructions were specific. The Internal Revenue Service has asserted that all of its regulations are interpretative rules and therefore are exempt from RFA analysis. This assertion has been strongly contested by the Chamber and the small business community for years. IRS regulations are indeed federal regulations and undoubtedly pose significant economic problems for the small business community. This issue was taken up at the Senate committee level during debate on the original RFA. The result, however, was an ineffective provision that lacked an authoritative executor, and again, left small business owners without a forum to voice their concerns.

These examples suggest several needed changes to the RFA. First, the Small Business Administration (SBA) should be authorized to issue uniform guidelines for agencies to use in establishing their individual RFA compliance procedures. (The Environmental Protection Agency now uses a similar tool in its procedures.) This would serve the dual purpose of increasing agency compliance with the RFA, and providing a rebuttable presumption of compliance if later challenged. Second, the current prohibition of

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[1] The Family and Medical Leave Act of 1993, Federal Regulations Part 825. U.S. Department of Labor Employment Standards Administration, Wage and Hour Division; June, 1993, p.39

judicial review of compliance must be lifted. Courts should have jurisdiction in those cases where the needs of the small business community have been sacrificed in the interests of expediency. The members of the Committee must understand that this legislation would not render the regulatory process more litigious but rather ensure its equity. I know you are particularly interested in other remedies—but judicial review is the core issue of this debate, and from our perspective, it is the best solution.

The legislation that was passed in the House of Representatives, H.R. 926, has a section entitled "Rules Commented on by SBA Chief Counsel for Advocacy." The essence of this provision is that agencies proposing rules should provide advance copies to the Chief Counsel 30 days before a notice of proposed rulemaking is published. This would allow the Chief Counsel time to analyze the proposal. If he chooses to comment, the agency must publish the comment along with their response.

Generally, this is a good idea. I would point out, however, that too often Congress is quick to increase an agency's area of responsibility without increasing its corresponding resources. If the Office of Advocacy becomes overwhelmed with the number of regulations it is asked to review, significant regulations upon which it should comment may slip through the cracks. Substantial harm could result if this failure on the part of the Office of Advocacy was somehow construed as approval of the proposed regulation. At a minimum, I would like to see clear language that failure to comment should not be construed as approval.

H.R. 926 also contains language to clarify the authority of the Chief Counsel to file amicus curiae (friend of the court) briefs in cases that will foreseeably affect the small business community. Although the original RFA did contemplate the filing of such briefs, the Chief Counsel's attempts to do so in the past have been met with considerable opposition. Permitting the Chief Counsel to bring the plight of small businesses to the court's attention is a valuable tool which we support.

The last Congress nearly saw needed amendments to the RFA enacted. As I mentioned, the Senate adopted an amendment to the National Competitiveness Act that would have strengthened the law, and the House, by an overwhelming margin, passed a motion to instruct the conferees to accept the language. Regretfully, the conferees were unable to agree on the underlying bill, and RFA reform failed.

This Congress is on the cusp of enacting these pro-small business changes. The need for this kind of legislation was part of the message delivered last November, and it is very exciting to see the momentum that has developed so quickly. We applaud your efforts and look forward to working with you to ensure continued success.

On behalf of the U.S. Chamber of Commerce, I thank you for this opportunity to present our views, and I welcome any questions from the Committee.

Chairman BOND. Thank you, Mr. Voight. You mentioned the need for more specific guidelines. Do you think Congress should try to define the terms "significant impact" or "economic burdens," or is that better left to regulation?

Mr. VOIGHT. I am not sure that is a good task for Congress for the most part. I think sometimes that Congress might tend to get bogged down too much in details. I think Congress works best in broad terms, certainly. I think in regard to the Family Medical Leave Act that I mentioned the problem may well have been of congressional origin. It was Congress that did put in the exemption that in this particular case defined small business as having 50 or fewer and then the agency just simply followed that. So I think that Congress probably as a general rule of thumb ought to seek broad guidelines rather than being too specific.

Chairman BOND. Would you give the small business Chief Counsel for Advocacy the power to issue regulations to define the operative terms?

Mr. VOIGHT. I think when the Office of Chief Counsel was originally established in 1976 it was contemplated that that office would have a role that would be strongly supportive and protective of small business interests and concerns, and I think that kind of authority would be compatible with the intent when the office was first created in 1976.

Chairman BOND. So we would be getting more rules and regulations at a time when we are——

Mr. VOIGHT. Unfortunately, small business, and all business indeed, large and small, are not necessarily happy about the fact that Government is often a not-so-silent partner in their business. I do not think we can realistically expect all regulations to go away. We want regulations to make sense. That is the intent of the Regulatory Flexibility Act. It is not, do not regulate. It is, regulate sensibly and to put the burden fairly, particularly on small entities and small businesses.

The underlying premise is, small businesses can less capably respond to these regulatory burdens. They have fewer bookkeepers, fewer lawyers, fewer dollars to comply with, and that sort of thing. If we want to make this work sensibly I think an office like the Office of Advocacy as a kind of effective entity has some promise.

Chairman BOND. You mentioned the interpretive rules by the IRS. I will have to say, as we have held hearings and sought information, the IRS does have the distinction of appearing on almost everybody's list. Have you run into or have you heard reports of problems where you get the equivalent of interpretive rules or guidelines from EPA which also can have impact without going through the normal regulatory process?

Mr. VOIGHT. I could not cite a specific instance where that has occurred but I would be rather surprised if it has not. The principle that IRS uses would be equally applicable to other agencies; that they would argue that is a direct congressional mandate that requires them to do this. So I would be real surprised if we could not find examples. I could not cite one. I would have to research that for you.

I think the unique aspect of IRS is this near-blanket approach. Their statement is that all our rules are interpretive, and therefore we do not have to pay any attention to you at all.

Chairman BOND. You express concern about the pre-notification idea for the Office of Advocacy to get notification in advance. It would seem to me that if the agencies had to submit something to the Office of Advocacy in advance, you have the same number of regulations coming before the Chief Counsel but having them come to the attention of that agency in advance might give the agency greater clout. They are going to have to deal with the same workload anyhow, are they not?

Mr. VOIGHT. My concern is this; that there not be a presumption that failure to comment be construed as approval. I think the idea of having the pre-notification does make sense. I think it does give you a chance for formalized small business input into the process. But I think if you somehow stood that on its head by saying, they did not comment, therefore it must be okay, could carry some risk with it. So I would just want to make sure that there was a safeguard there that that presumption was not carried through.

Chairman BOND. Mr. Voight, we will leave the record open for further questions that members of the committee may have for you when they review your testimony. I would invite the staff for the members who are here to submit those questions. We will excuse you and I am going to turn now to Mr. Glover.

Mr. VOIGHT. I appreciate very much your thoughtfulness.

Chairman BOND. Thank you, sir. We will follow up.

Mr. Voight has just outlined some problems on the pre-notification. Number one, if you were put in the pre-notification process, how would that differ from what you are doing now? I understand now you get the Federal Register and hastily rip it up and assign it out to staff after the fact. What would be the impact on your office if you got it before?

Mr. GLOVER. We would look at the things twice. And one of the things that I think Mr. Voight mentioned that is very, very true is we certainly do not want the failure to comment by the office to have any implied approval because we will not have the resources to look at every regulation carefully in this pre-notification period.

One of the things that we do routinely is go to the industry, go to the small businesses that are affected, and go to the associations that work with them after the regulation has been published. Often we are the first people who have ever told them there is a problem. Now the Regulatory Flexibility Act does have provisions that require the agency to go out and do outreach, but that is one of the failings that many of the agencies have. So we get their input.

In the pre-publication stage, which is basically a confidential proposal, we would not be able to go to the industry. So what we would have to do is look at our limited resources in-house and our expertise. We simply do not have the people to do a good job of that. Will it help us to see the proposals earlier? It will be of some assistance, but I would not want to overstate the value of that process.

Chairman BOND. But I would imagine that with the experience that you have had, will there not be regulations which obviously to your staff would have an impact? I mean, is this not something

where you can pretty quickly winnow out the routine administrative regulations from the ones that may have some significant impact?

Mr. GLOVER. Yes, we can do that and we certainly will do that. But there will still be probably more than we can get heavily involved with. We have to prioritize those regs we think that are——

Chairman BOND. But you could at least raise the question, you would know where to raise the questions in advance and put a marker out.

Mr. GLOVER. Certainly.

Chairman BOND. What is your view about the need for rules or definitions and guidelines for the Reg Flex Act?

Mr. GLOVER. When I served with Dave Voight as deputy chief counsel in 1980, right after the law was passed we did prepare guidelines. While those guidelines do not have the effect of regulations, it was intended that those regulations, those guidelines would give the agencies guidance. I think we would also probably work together to publish some guidelines and dust off those old ones that never formally got released after we left the office and look at those.

We will issue some guidelines. The courts, of course, are free to ignore them—as opposed to regulations, and it is difficult for me to propose doing regulations for fear of being lynched as I speak to small businesspeople. Proposing doing any regulations for any purpose is never met with warm affectionate feelings. But I would think that we can publish some guidelines that will help clarify the law in certain areas, and as we go along a few cases will clarify some of these words far better than any regulations will.

The deterrent effect in 1980 when the law was first passed, for many years the agencies really did make a far better effort to comply than they have in recent history. Once they realized that the Office of Advocacy was just bluffing, that we really had no teeth, gradually compliance declined. With the courts involved, that will not happen.

Chairman BOND. Section 610 requires each agency to publish a list of rules that have significant economic impact on a substantial number of small businesses over the succeeding 12 months, and Section 602 requires a Federal agency to publish in October and April of each year its regulatory flexibility agenda. Do you find that this periodic review is being undertaken by Federal agencies, and what benefit is this? Is this the kind of thing that is a benefit, or is this unnecessary? Is it make-work? How do we get down to the things that are really important and cut out the other unnecessary burdens?

Mr. GLOVER. I think it is more important for the agencies than it is for small business. It requires them to think about what they are doing in advance. Small businesses get those and they look at them to see what is going on. We look at them and know where we are going to be needing resources during the year, and we start talking about some of those regulations early on. We have negotiations and discussions with the agencies and try to alert them to the problems. We have our economists give them a heads-up in some cases. So it is of assistance.

It is not the most important part of the legislation by any means. But it forces the agencies to think about that in advance and I think it is very beneficial.

Chairman BOND. It is still worth the effort though?

Mr. GLOVER. Yes, sir.

Chairman BOND. With that, we have been joined by Senator Wellstone. I am going to take a break in my questions and ask the Senator if he wishes to make a statement or to ask questions of the witnesses. Welcome.

Senator WELLSTONE. Thank you, Mr. Chairman. I have a brief two-hour statement that I would like——

Chairman BOND. We will accept that for the record on the express condition that it not be given. [Laughter.]

Senator WELLSTONE. First of all, Mr. Chairman, I appreciate the direction that I think you are trying to go with this committee. My understanding is that, going back to the act of 1980, the agencies really were supposed to take a look at regulations and their effect on small businesses and that just has not really happened. Mr. Glover, I very much appreciate the work that you have been doing as an advocate. It has really been important.

Mr. Chairman, SBA is extremely active in Minnesota, very active with the 504, 7(a) and MicroLoan programs. Mr. Chairman, we have some incredible success stories in terms of a little amount of money invested and what it has leveraged. It is just quite amazing.

I am at the point right now, Mr. Chairman, and Mr. Glover, where I am trying to kind of just understand this bill a little bit better. I have two questions. When I look through the language of the bill the operative language to me is, an affected small entity may petition for the judicial review. That is really what we are talking about here is how do you get agencies serious about really following through on what was the mandate of the 1980 legislation.

Then when I look through the bill a little further it says, for purposes of this subsection the term, affected small entity—that is really what I am trying to get at—means a small entity that is or will be adversely affected by the final rule. I guess I am assuming we are talking about small businesses.

Mr. GLOVER. Small business and small cities and townships.

Chairman BOND. In the RFA you get small governmental units.

Senator WELLSTONE. Right. Now when I look at the summary page here of the expanded regulatory flexibility proposal I see language that says, any affected small business or association the business belongs to will have the right to judicial review. I am trying to get clear as to whether or not this bill, (a) whether we are talking about a small business or small governmental unit being able to have the right of judicial review, or whether or not we are talking about associations being able to have the right of judicial review, which seems to me has very different sets of implications. I wonder whether I could get some clarity on that point first of all from one of you all.

Mr. GLOVER. Often small businesses will not have the resources to challenge in court a Federal regulation, but their association of small businesses together—for example, towns and townships, the national organization is very interested in making the Regulatory Flexibility Act work better. There are regulations that have been

imposed on them, and obviously the unfunded mandates issue is a case in point. Perhaps if the Regulatory Flexibility Act had been better enforced early on some of those issues would not be coming up today—if we had done a better job of looking at the regulatory burdens that were placed on the small towns and townships.

So their organizations, the proposal is to allow, on occasion, those organizations to go into court and represent all of the small entities. It would not allow, for example, a large firm to challenge the analysis and seek judicial review and I think that is clearly appropriate.

Senator WELLSTONE. In other words, when we are talking about an affected small entity may petition for judicial review we would also be talking about—because I do not see anywhere in the bill—an association. We are talking about a chamber, or a federation could have the right of judicial review representing small businesses. Is this correct? This is the distinction I want to be clear about.

Mr. GLOVER. There are some proposals to allow associations of small firms to seek judicial review. I think the bill in the House did not; it just said small entities. I think that that is a judgment call. I prefer to allow the small entity—if the association wants to help the small entity financially that is fine. But I think that clearly a small entity needs to be named as the principal filing the action. But it is not something I think makes a big difference between the two.

Senator WELLSTONE. Mr. Chairman, Mr. Glover, I would like to make it clear to everybody here that I am thinking out loud. I have no set position yet. I am just trying to understand this. I know the Judiciary Committee is going to be holding some hearings, Mr. Chairman, on your bill as well.

So just let me be clear. To my mind, if we are talking about an affected small entity we are talking about small business or governmental unit, right?

Mr. GLOVER. Correct.

Senator WELLSTONE. I understand full well what has not worked. I understand full well the importance of really trying to make the 1980 legislation make a difference. I understand the importance of really figuring out what the leverage is and getting people to take this law seriously. I understand the small business' point of view.

But there seems to me to be a distinction between allowing a small business or small entity as opposed to an association because with an association, it could be association. It could be chamber, it could be federation, many others. Then I think, am I wrong, we might be talking about a somewhat different dynamic where people are going to court kind of on the basis of sort of some major ideological differences in regard to a whole set of different laws that are on the books as opposed to the small business having that right.

So which is it? Can the association do this or not?

Mr. GLOVER. I would prefer to have—different proposed legislation is different. I prefer it to be the small entity. Clearly, we have situations, and I point out in my testimony some examples of where large firms and small firms have a diametrically opposed position. For example, in air pollution do you regulate the service sta-

tion or do you regulate the automobile manufacturer? So clearly you will have a conflict in that situation. There are associations that happen to have large and small firms in them as well.

Practically speaking, if an association believes that a small entity has been affected and wants to fund that and have the small entity be the party filing the action, I do not see anything wrong with that. I would prefer it be the small entity as opposed to anyone else.

Now there were some discussions early on as to how we could modify or adjust that and some thought that the associations really would be doing this anyhow and why not let them be named. There were some early discussions about that, but in terms of what I would prefer, I would prefer that the small entity be named and if associations want to fund it, so be it. Anybody can help them fund the litigation cost.

Senator WELLSTONE. I thank you. I am sorry for coming in—if you had already covered this question, I really apologize for raising it all over again.

Mr. GLOVER. One of my real concerns is with, for example, the House version that added some other provisions that are primarily for big business. Those provisions have different judicial review standards than the Regulatory Flexibility Act. If you allow big business to do some of the same things under the legislation, small business gets lost in the shuffle. We do not get the special attention that is needed because of the burden and the likelihood small businesses will not be there to express their views, will not even know about it till it is too late.

Senator WELLSTONE. Right. With regard to the special attention part, I appreciate the distinction, the focus on small business. Mr. Chairman, I learned, I guess it was last session on a couple of pieces of legislation, I think one had to do with technology policy and small businesses continue to get lost sight of during the process. Then there was another one just in terms of problems with procurement and where did small businesses fit into that effort.

We have to focus on and take seriously what should have been going on ever since 1980 when the RFA was enacted into law. I want to focus more on this distinction as we go further along with this issue. But I thank you for your effort, Mr. Chairman, and I think it is an important move in the right direction. I thank you for your testimony, Mr. Glover.

Chairman BOND. Mr. Finch, let me turn back to you because your testimony is very helpful. I assume that, at least in the GAO's view, there is no basis for the IRS decision that the Reg Flex Act does not apply to them. Congress did not make a mistake back in 1980 and draft the legislation so the IRS was not covered, did they?

Mr. FINCH. Senator, I found it interesting, somebody made the comment about IRS being on everybody's list. I think that is unique because I sometimes get the feeling that everybody is on IRS's list.

Chairman BOND. It works both ways.

Mr. FINCH. It certainly does. IRS does seem to have taken a rather blanket approach to its interpretation of the law, yes, sir.

Chairman BOND. Do you find that there are certain agencies that on a consistent basis simply ignore the Reg Flex Act?

Mr. FINCH. Yes, sir, that seemed to be the case in terms of our looking at the SBA reports over that period of time. I think we covered a 12-year period of time, and there were some categories of inconsistency where agencies had not complied.

Chairman BOND. Any particular ones?

Mr. FINCH. In looking at the reports, the agencies that SBA had problems with most frequently included IRS, USDA, Bureau of Land Management, and the Federal Energy Regulatory Commission. The "good guys," it seemed to me, if I can put them in that category, and recognizing there were still some problems with them too, were the EPA, SEC, and FAA. There was also a category of agencies that we noticed that seemed to have improved their performance over time.

Chairman BOND. Let us give some kudos where they are deserved.

Mr. FINCH. They started out not too well but seemed to have improved over time. Those included the National Marine Fisheries Service, FEMA, Office of Surface Mining and Enforcement, and the Consumer Products Safety Commission. Then there were those with a checkered history, those whose compliance would be good for a while and then would sort of go downhill for a while. Those included FCC, DOT, and DOL.

Chairman BOND. You mentioned a thing that is really interesting to me, that OMB could help in the review. Should we specifically include in these amendments provision for OMB to be an arbiter of disagreements between the chief counsel of the SBA and the agencies within the jurisdiction of OMB?

Mr. FINCH. I think it is certainly worth considering, Mr. Chairman. The point that we saw when we looked at the situation was that there was not really an enforcement mechanism in the review process that existed at the time. Then, in 1993, the President issued Executive Order 12866, which gave OMB the right to look at regulations that have a significant impact. OMB sort of becomes an enforcement mechanism because they can keep referring a regulation back to the agency if they are not satisfied with it's compliance with the Act.

At the time, OMB was not really looking at Regulatory Flexibility Act compliance because they did not really have any procedures in their regulatory review process. We asked them why that was, and they said it was because SBA had not really issued any guidance; therefore, they did not really know what to look for in the review process. Having brought this to the attention of the two agencies, the two agencies have now, I think, taken real, positive steps forward in terms of cooperating. SBA has agreed that it will issue some guidance to agencies, recognizing that this is done on a voluntary basis because they do not have statutory authority to do this.

Chairman BOND. Would you give them statutory authority to issue guidelines?

Mr. FINCH. I think it is something worth considering, Senator, I really do. The reason I say that is, while we feel really encouraged about where OMB and SBA are now—and I think they can probably cite some examples of how they have made things a little better with this joint arrangement than they were before—I guess I

would point to the fact that individuals change over time, administrations change over time, positions change over time. So if we wanted to lock it in and have assurance that the present procedure would be in place beyond perhaps Mr. Glover's tenure, then I would think so, yes.

Chairman BOND. Obviously there is a problem for the so-called independent agencies. To my way of thinking, the judicial review is the ultimate penalty. If you are going to have it enforced, you need to have it there. But I am a great believer in also finding ways to avoid the litigation step if possible. It seems to me that OMB and OIRA as a mediator in the process could help with the agencies directly under OMB control. But where would you put that function for the so-called independent agencies?

Mr. FINCH. That is a sticky question and that is the reason that we suggested that Congress could focus its oversight efforts on two gaps, one being the independent regulatory agencies. I do not know if Mr. Glover has thoughts in that regard.

Chairman BOND. I am going to turn to him, but where would you put it?

Mr. FINCH. Where would——

Chairman BOND. The mediation function, the function that OMB would provide for the non-independent agencies? We need someplace——

Mr. FINCH. Given that, I would put it in OMB I believe, sir.

Chairman BOND. You would give OMB that authority?

Mr. FINCH. I believe so, sir. I really have not thought that through. I guess I would like the opportunity to think that through and respond to that for the record.

Chairman BOND. I would appreciate any suggestions. One that comes obviously to mind but does not happen to be in the executive branch would be the CBO or something like that. I do not know whether you would want to burden them down and that is outside the administrative process. That is troubling.

Mr. FINCH. It is a meaty question and I would like the opportunity to think it through before responding. But we will respond for the record.

[In further response, Mr. Finch submitted the following:]

Response: As we said in our report, we believe that Congress should focus its oversight of the Regulatory Flexibility Act's enforcement on two "gaps" in OMB's review authority—independent regulatory agencies and agricultural marketing orders from the Agricultural Marketing Service.

Under both Executive Order 12866 (and its predecessor, Executive Order 12291), OMB's review authority does not extend to independent regulatory agencies. However, the Regulatory Flexibility Act's requirements do apply to those agencies, and the SBA's Chief Counsel for Advocacy's annual reports indicate their degree of compliance with the act. By reviewing those reports, or by separate notification by the Chief Counsel for Advocacy, Congress can become aware of any noncompliance with the act. Through its oversight and appropriations activities, Congress can help ensure that those agencies comply with the act.

Chairman BOND. Now we will turn, as one of the talk show hosts says, to get the real answer and ask Mr. Glover where he thinks that might be lodged.

Mr. GLOVER. I will preface my remarks by saying that OMB and OIRA have been very supportive of our efforts to encourage compliance of the Regulatory Flexibility Act. Having said that and recognizing that I have been in this job for less than a year, and hav-

ing had some experience with OMB historically, they are hardly the friend of small business. To allow them to arbitrate this issue may be putting the fox in the chicken coop. I am not sure how often they are going to decide with us against the rest of Government. They are under a lot of pressure for a lot of different reasons. This is not their sole priority. It is the Office of Advocacy's sole priority.

Having said that, I would think that certainly if they want to be involved in the process or if you choose to have them involved in the process I would want to make very sure that their decision was not in any way binding on courts when they review that. It might be a process which the parties could go to as an alternate dispute resolution perhaps when they wanted to.

But I think that the judicial review is what will make the agencies change their way of doing business. They will look at it as one more friend in the Government on their side. While this particular office of OMB is more supportive of what we are trying to do, historically that has not been the case. OMB has not always been the friend of small business and I suspect they in the future will backslide into not being our friend again.

Chairman BOND. Is there any other place, short of judicial review, any other agency or any mechanism that you would recommend to give clout in the administrative process to the Office of Advocacy?

Mr. GLOVER. The two times that we have gone forward and said, we are going to file amicus briefs, that threat—which they now believe because they did the same thing they have done to previous chief counsels with me is they had the Justice Department call up and the Solicitor General's office call up and tell everybody not to do this. And we said, look, we are going to do it. If you do not think we have the authority, tell it to the court.

Once they knew that was real, then you see serious negotiations. So I think they are very concerned about litigation.

You also have the Equal Access to Justice Act, which means that if the agency continues through the court proceedings and they are not justified in their position and they are going to lose, they are going to have to pay the legal fees of the small business that filed that action. So there is an extra whammy there already.

We have had negotiations with agencies, and even with the Internal Revenue Service. A classic example of a very bad, overly broad regulation was the partnership anti-abuse regulations where they came in and basically, at least in my opinion, would have made it impossible to certify a partner's return, a CPA could not certify a partnership return for the average business because it would have to spend literally thousands of hours to figure out whether they were in compliance with these new regs. We did work to get that fixed and they have improved their proposal twice during negotiations.

If they fear a lawsuit, that will do more than any intermediate step.

Chairman BOND. I think there is also one other thing. Senator Dole's regulatory reform bill that is moving forward has the provision, a measure sponsored by Senator Nickles, that has the 45-day notice for Congress. If the Office of Advocacy has flagged one of these regulations as not having complied with the Reg Flex Act, I

think that ought to be a very loud bell going off for Congress when it comes before us to take a look at how the agency has formulated that.

Let me ask one question, something I have had a little familiarity with, the Family and Medical Leave Act. We all know that was controversial. I was in the middle of that fight. I would be interested in whether you think the Labor Department has completed a thorough Regulatory Flexibility Act analysis. Has it complied with the RFA?

Mr. GLOVER. They have basically chosen the 50 or fewer definition and said, with regard to those we do not have to do it because we have sort of carved out small business; the Congress has defined small business. I think it would have been appropriate for them to look at the firms with 50 and over employees in many industries and many areas. It is an area because Congress—and we often find this—that Congress basically has tied the hands of agencies, or perhaps given them a loophole they can drive a truck through. And that often happens where they simply say, sorry, it is not our fault. It is Congress' fault.

But I think that clearly had there not been a clear definition we would have been in better shape on that. I think that there is some real recognition that that particular piece of legislation and the ensuing regulations will have an adverse impact on some of the small businesses.

Chairman BOND. I can tell you that it was not the legislative intent to change the definition of small business, but simply to agree upon a size of business, which for the purposes of the Family and Medical Leave Act we in Congress felt that with less than 50 employees the burdens were potentially too great. That does not change the general small business definition of up to 500 employees. For those small businesses in that 50 to 500 category, or 50 and above small businesses it certainly, in my view, should have been covered.

Let me turn to Mr. Finch and see if he has any final comments on the discussion I have just had with Mr. Glover.

Mr. FINCH. No, sir, I do not.

Chairman BOND. Thank you very much, gentlemen. We appreciate your testimony, and as I indicated previously, the record will remain open so that others of my colleagues who may have questions may submit them for the record.

Now I would like to call to the table Mr. Michael O. Roush, director of Senate lobbyists for the National Federation of Independent Business, and Mr. John S. Satagaj, president of the Small Business Legislative Council.

Mr. Roush, if you would like to begin, sir. As I indicated to the other witnesses, your full testimony will be made a part of the record. We would invite you to summarize to the extent that you feel appropriate for the Committee, and we will obviously be able to cover more of this material in the question and answer session.

STATEMENT OF MICHAEL O. ROUSH, DIRECTOR OF SENATE FEDERAL GOVERNMENTAL AFFAIRS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. ROUSH. Thank you, Mr. Chairman. I will be brief. My name, as you said, is Mike Roush and I am with the National Federation of Independent Business. NFIB is an organization that represents some 600,000 small business owners. Our typical member has about 5 employees and has a gross income of about $250,000 a year. It is our members who set the legislative position for the organization. On behalf of those members I am pleased to be here to talk about the Regulatory Flexibility Act and judicial review.

Mr. Chairman, according to the original Act, the purpose was "to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of appropriate statutes, to fit regulatory and informational requirements to the scale of the business." In order to accomplish that goal they instituted certain procedures and analyses that the agencies had to fulfill. But the goal, the purpose, of the Act was to fit regulations to the scale of the business, not to just institute some abstract formal procedures.

Those procedures and the content of those analyses need to be reviewable by somebody. While it is true, and I agree with the other witnesses that some aspects of the Regulatory Flexibility Act need to be amended in a substantive way, the first step we believe to fulfilling the promise of the Act is a tough judicial review provision. A second step would probably be to allow Congress to have some period of time to review regulations, as you indicated, Mr. Chairman.

This is because for the last 15 years our experience with the Act has been at least, as the chief counsel says, "troubling." But more accurately from the small business point of view, it has been infuriating to watch agencies like the IRS ignore the Act and to watch many other agencies essentially subvert the purpose of the Act with boilerplate language or with superficial fulfillment of the procedural steps required in the Act.

It has been further frustrating because the RFA was passed, I believe in large part to help small businesses comply with the law, to make it easier to comply with the law, and to try to bring some flexibility in the enforcement by the agencies of the laws. But the bureaucracy's creative resistance has made the Regulatory Flexibility Act almost laughable in some quarters and has shown clearly, we believe, that there is a need for a tough, tight, no loophole, judicial review provision.

The Regulatory Flexibility Act is the father, so to speak, of many of the proposals that are floating around now for cost-benefit analysis or impact analysis. But getting a good Regulatory Flexibility Act would make those other proposals almost, not completely but almost, redundant for small business. We support those other proposals. We intend to do what we can to help get those other proposals enacted. But I do want to emphasize that it is this proposal, judicial review for regulatory flexibility, that is the small business part of the regulatory reform debate.

Many people that I have talked to in the last few weeks about this issue, particularly Judiciary Committee-type lawyers, say that

judicial review and various types of judicial review for RFA, particularly, will make the Administrative Procedures Act unworkable, that agencies will sort of fall apart, that uncertainty will reign, that nothing will be final, and that the regulatory environment will just become chaos.

Well, small business owners, as you know, have more interest than most in this society for a stable regulatory environment. And they value finality, clarity, and certainty in Government actions probably, as I said, more than most in this society. But those values they strongly believe have to be weighed and balanced with the burden of regulations and with the overall compliance rate.

It is interesting to note that the same fears were expressed in the 1940s when the Administrative Procedures Act itself was being considered. It took 10 years to get that act passed. And when it passed the then-Attorney General Tom Clark stated that, "My conclusion as to the workability of the proposed legislation rests on my belief that the provisions of the bill can and should be construed reasonably and in a sense which will fairly balance the requirements and interests of private persons and Government agencies."

It is my hope and expectation that a strong judicial review can be instituted for regulatory flexibility and still accomplish those very same hopes that the Attorney General at the time had for the APA.

In fact, I would characterize most of the objections that I have run into—if you will give me a moment for expressing a personal editorial comment—as either simple mental inertia, pure pettifoggery, or ignorance of the intent of the Regulatory Flexibility Act.

Your bill, Mr. Chairman, S. 350, is an excellent, excellent start and we believe that if it were passed as is, it would make a vast improvement over the current situation. However, it is our view that it can be tightened and made even tougher. Again, I go back to the experience of the last 15 years as to why we want it as tough as we can get. We think S. 350 can be made tougher in six specific areas which I would be happy to go through in questions because I think I am getting close to my five minutes.

All I would like to conclude with saying is that we would ask for your assistance, and the committee's assistance, and hopefully on a bipartisan basis, because this is a bill that has a bipartisan history, to get as strong as possible judicial review out of the current process. Thank you, Mr. Chairman.

[The prepared statement of Mr. Roush follows:]

MICHAEL O. ROUSH

DIRECTOR OF
FEDERAL GOVERNMENTAL RELATIONS - SENATE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB)

The Costs of Regulations

Small business owners across this country are being trampled by the costs and burdens associated with regulations. The evidence is abundant and also easily convincing. NFIB has gathered it from our own research, others in Washington researching this issue, and most importantly from individual members who are struggling to comply with the federal government's web of regulations and paperwork requirements

The NFIB Education Foundation, NFIB's research arm, published in 1992 an extensive survey entitled "Small Business Problems and Priorities." It looked at and ranked the top 75 problems facing small business. Problems relating to regulation and government paperwork were the fastest rising area of concern in the entire survey. In the most recent data available from the NFIB Education Foundation's monthly "Small Business Economic Trends," taxes and regulations were the top problems facing small businesses.

Another NFIB Education Foundation study ("New Business in America") clearly illustrates the impact regulations have on new businesses, which create about one-third of the new jobs in the economy. The study found that of all the challenges faced by a new business, owners are least prepared to deal with government regulations and red tape, and are generally surprised by the extent to which government plays a role in their business.

When looking at the data, it is easy to see why regulations are the fastest growing concern to small business owners. According to studies done by Thomas Hopkins of the Rochester Institute of Technology, William G. Laffer III and Nancy Bord of the Heritage Foundation, the direct costs of regulatory compliance to businesses that are associated with regulatory compliance are somewhere in the range of $500 billion to $800 billion dollars per year. The Administration pointed out in its National Performance Review that the compliance costs imposed by federal regulations on the private sector were at least $430 billion per year or 9 percent of GDP.

Complying with regulations costs our economy dearly. The hidden tax of complying with regulation is no less a tax than any other government levy. And when it comes to businesses, this hidden tax is regressive; it hits the "little guy" the hardest.

There are several reasons why smaller businesses bear a heavier regulatory burden than larger businesses. One reason has to do with the fixed cost aspect of much regulation. Fixed costs are independent of output, i.e., any company affected by the regulation pays the same fixed cost.

This is a technical explanation, but simply put, small business because of economies of scale is not equipped to deal with many federal regulations. Walk into any small business and look for the accounting department, the legal counsel, or the human resources division. You will not find them.

Unfortunately, the case I just made has never been understood by bureaucrats. The avalanche of regulation continues to pummel the small business owner. As an indication,

there were 64,914 pages in the Federal Register in 1994, this is compared to 44,812 pages in 1986 -- an increase of 20,102 pages. Just remember how small the print is on each page of the Federal Register and one can begin to conceptualize the burden of the regulatory avalanche.

The letters we receive from NFIB members speak louder than statistics. For example, a small construction company inquired about bidding on a small remodeling project at a post office in South Dakota. The owner says he received 34 pages of plans, 400 pages of building specs and a 100 page book of bidding instructions. Of these instructions, this small business owner wrote in a letter to the U.S. Postmaster, "If [your] goal is to discourage prospective bidders, I'm sure [you have been] successful."

Then there is the woman from Connecticut who used her and her husband's family savings to open a small manufacturing business. She says, "While [these] regulations start out with good intentions, the end result is that many become confusing and are too onerous for a small business owner like myself to deal with effectively. As a result, the employees also suffer. The money we spend simply trying to comply with these rules could be better spent on the growth of our business, creating more jobs and benefitting our current employees."

As an example she points to certain OSHA rules. "There's the lockout/tagout requirement that needs a manual basically to say if a machine is not functioning properly, turn it off, pull the plug and make sure nobody else uses it until it's fixed. Of course, in a small shop like ours, with few machines, everyone knows when a machine is broken, and the machine is fixed immediately or we can't produce. There is the Material Safety Data Sheets, which is a listing for various types of hazardous materials which must be kept track of. Yet, after some searching, I am still unable to find someone knowledgeable on these substances and where they are found exactly."

Then there is the small business owner who is confused by the I-9 immigration forms. She writes, "It reads something like a Chinese food menu."

Yet another example is the woman small business owner from Florida who comments on small business's inability to secure financing because of government regulation, "...red tape or paperwork is the single biggest obstacle in securing small business financing today. Business owners are often totally discouraged and disgusted with the amount of paperwork required for lines of credit, small business loans, home equity loans, etc. And the costs involved in closing a loan due to regulations that must be enforced are staggering. Commercial appraisals have risen from approximately $1,000 to $2,500. Documentary preparation fees have risen from $0 to $250. A recent small business loan of $300,000 secured by real estate had closing costs of a whopping $8,600 or 2.9% of the loan value -- all attributable to new regulatory guidelines."

Finally, a small business owner from Maryland illustrates what is wrong with the system, he states; "Under current operating rules, OSHA representatives cannot consult or advise us -- if they come on our job sites they can only write citations. You must certainly

understand that this engenders an 'us vs. them' mentality if we are visited." He goes on to explain, "Currently, even the smallest error in safety can result in an expensive fine or many hours of letter writing, meetings, lawyers and management hours expended. This is so because in the present context OSHA has admitted that the penalty structure is designed not to improve safety but rather to raise revenue."

The Need to Strengthen the Regulatory Flexibility Act

There are many things that can be done to ease the burden of regulations that are placed on the backs of small businesses. A great place to start and the reason for today's hearing is to strengthen the Regulatory Flexibility Act of 1980.

As this Committee knows, the Regulatory Flexibility Act is not protecting small business from regulatory burdens as it was originally intended. The Regulatory Flexibility Act was designed to ease the regressive impact of "one-size-fits-all" regulations on small business. It was supposed to force regulators to consider the differences between big and small businesses, and to take into consideration the economies of scale.

It is important to note that NFIB is firmly opposed to incorporating big business into the Regulatory Flexibility Act, as has been suggested by some members of the U.S. House of Representatives. Doing so will take the focus of regulatory flexibility away from small business and may dilute the benefits America's entrepreneurs need most.

Under the Regulatory Flexibility Act (Reg-Flex), agencies issuing regulations must analyze and describe the impact the regulation would have on small businesses and other small entities. The analysis must outline possible alternatives to the proposed regulation which would accomplish the same objectives at a lower economic impact on small business.

Examples of alternatives agencies must consider include:

1. Establishing differing compliance or reporting requirements that take into account the resources available to small businesses;
2. Using performance rather than design standards; and
3. Exempting small businesses from all or parts of the regulation.

At the same time the final rule is issued, the changes (or lack of changes) made to the regulation on behalf of small business are also published. If a less costly alternative for small business was not adopted, an explanation must be provided by the agency.

Reg-Flex does not start from the premise of whether the regulation is needed. Rather it requires agencies to consider the type of regulation imposed and whether it is the least burdensome means of achieving the objectives of the agency for small business.

The original purpose of the Regulatory Flexibility Act states,

> "It is the purpose of this Act to establish as a principle of regulatory issuance

> that agencies shall endeavor, consistent with the objectives of the rule and of applicable statues, **to fit regulatory and informational requirements to the scale of the businesses**, organizations and governmental jurisdictions subject to regulation." (P.L. 96-354)

Sounds good, doesn't it? But wait.

There is no way to enforce the compliance of regulators with Reg-Flex. Section 611 of the original Act includes a specific prohibition on judicial review of Reg-Flex analyses.

Because Reg-Flex is not enforceable, agencies like the Internal Revenue Service and the Department of Defense exploit the loopholes and ignore the Reg-Flex Act. Small business needs a hammer to force agencies to comply. That hammer is judicial review, or judicial enforcement, which will allow an agency's compliance with Reg-Flex to be challenged in a court of law.

In the 103rd Congress under Senator Malcolm Wallop's leadership, both Houses of Congress overwhelmingly approved legislation removing the prohibition of judicial review for the Regulatory Flexibility Act. The Senate, by a vote of 67 to 31, adopted an amendment to repeal the prohibition on judicial enforcement. Unfortunately, the National Competitiveness Act (S. 4), which was the vehicle for this needed reform, never made it to the President's desk because of disputes over other provisions in the legislation.

In this new Congress, NFIB is hopeful the President will live up to the tone he set in his letter to the Senate last year. He stated, "My Administration will continue to work with Congress and the small business community next year [1995] for enactment of a strong judicial review that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protections afforded by this statute." His support for strong judicial review was echoed in additional letters by the Administrator of the Small Business Administration, Phil Lader, and by the President's Chief of Staff, Leon Panetta.

Even the General Accounting Office has recommended that the Office of Management and Budget should prohibit publication of proposed or final rules that do not comply with the Regulatory Flexibility Act. (Regulatory Flexibility Act: Status of Agencies' Compliance, report no. GGD-94-105, GAO, April 1994)

Recommendations:

NFIB has developed a series of recommendations we believe will strengthen the Regulatory Flexibility Act.

1. **Repeal the prohibition on judicial review.** Together with President Clinton's support for strong judicial review and Vice President Gore's recommendation for judicial review in the National Performance Review, I believe Jere Glover, Chief Counsel for Advocacy at the Small Business Administration, sums it up best, "The only way to ensure that each rulemaking from every agency complies with both the letter and spirit of the RFA is

to make sure that an agency pays a 'penalty' for failing to comply...The best mechanism for doing that is through judicial review." Then, Mr. Glover goes on to state that "The fears of judicial review are overstated." (Testimony of Jere W. Glover before the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee, February 3, 1995.)

The first argument you will hear from federal agencies and pro-regulatory extremists is that judicial review of Reg-Flex will create a barrage of lawsuits, clog the courts and stop new regulations altogether -- the very same arguments they used in 1980 to get judicial enforcement prohibited. Well, we have tried it their way for 15 years, and it hasn't worked. After a decade and one-half, it is time to try it our way.

As long as federal agencies follow the law -- in this case the Reg-Flex law and take small business into consideration when they are drafting regulations -- they have nothing to fear with judicial review. Only the agencies who ignore small businesses and Reg-Flex should be worried. And hopefully after a couple recalcitrant agencies are reprimanded by a few federal judges, they will learn that they are no longer above the law and will start doing what Congress and the President originally intended them to do.

The high cost of litigation will most certainly limit small businesses use of judicial review making it a last-resort effort in only the very worst cases.

2. **Broaden standing.** As long as a small business can prove that it is, or it will be, adversely impacted by a regulation, we believe that the firm or an association of which the business is a member, should have standing and be allowed into court on this matter. A small business should be allowed to challenge a Reg-Flex analysis if:

A. the agency certifies there would be no significant impact on small business, and there is;
B. the agency does a defective job with the Reg-Flex analysis; or
C. the agency doesn't comply with Reg-Flex at all and completely ignores it during proposed and final rulemakings.

It is important for me to point out that giving not-for-profit membership associations of affected small businesses standing in judicial review cases was first proposed by the Administration during negotiations last year over Reg-Flex.

3. **Time to challenge.** NFIB believes a small business should have at least one year -- preferably two -- from the time the final rule is published or the effective date, whichever is later, to challenge a Reg-Flex analysis.

Chairman Bond's legislation, S. 350, as currently written, allows for a one-year period for small businesses to appeal Reg-Flex compliance. The one-year, however, defers to shorter statutes of limitation written into other laws including a 60-day period for OSHA and Clean Air Act standards. This provision not only significantly reduces the time a small business owner has to challenge Reg-Flex in court, it also creates an enormously complex patchwork

of time limits. I believe this Committee will agree that it is absolutely unreasonable to expect small business owners to know how a regulation will affect their business in 30 or 60 days.

By a vote of 420 to 5, the House recently corrected its bill, allowing a full year for small businesses to submit a challenge under Reg-Flex. That amendment, offered by Rep. Tom Ewing, was supported by 12 major organizations representing small businesses, including National Small Business United, the National Restaurant Association, the Small Business Legislative Council, the U.S. Chamber of Commerce, the National Association of Manufacturers and NFIB.

4. **Courts must "stay" regulations.** If an agency's compliance with Reg-Flex is successfully challenged in court, the court must stay -- or put on hold -- the regulation until the agency complies with the intent of the Reg-Flex Act and the court. This will save small business owners money that might have been spent complying with regulations that were not properly issued.

5. **Lower the burden of proof.** Chairman Bond's legislation currently forces small business owners to prove that an agency acted in an "arbitrary and capricious" manner while ignoring compliance with Reg-Flex. NFIB believes that standard is too high -- it will be too difficult for entrepreneurs to prove. We recommend lowering the standard to perhaps "clear and convincing," which Majority Leader Dole uses in sections of his omnibus regulatory reform bill (S. 343).

6. **Consider indirect effects.** Finally, we believe that agencies should consider not only the direct effects of regulations but the indirect effects as well in their Reg-Flex analyses.

For example, bank regulations may effect small businesses who are customers of a bank as much or more than the bank itself. The cost of record keeping requirements are rarely considered by agencies but are very real to small business owners!

Conclusion

NFIB is committed to ensuring small business owners receive strong and effective judicial review with strong remedies for non-compliance under the Regulatory Flexibility Act. We look forward to the President signing a bill into law that will accomplish this.

Thank you, Mr. Chairman, for allowing me to testify today on behalf of NFIB's more than 600,000 small business owners. I thank you for your leadership this area and the introduction of your bill. We look forward to working with you to strengthen the Regulatory Flexibility Act and other issues facing small business owners during the 104th Congress.

Chairman BOND. Thank you, Mr. Roush.
Mr. Satagaj.

STATEMENT OF JOHN S. SATAGAJ, PRESIDENT, SMALL BUSINESS LEGISLATIVE COUNCIL

Mr. SATAGAJ. Thank you, Mr. Chairman. I am John Satagaj, president of the Small Business Legislative Council. I am here today to support, first of all, your legislation, S. 350. We are very pleased that you introduced it and made it a high priority for this Committee.

I do not know what it says about us, but Mike, and Jere, and David, and myself in various degrees of participation had a lot to do with bringing this baby into the world in the first place. I do not know if it is good news or bad news we have been doing this that long, but we have all been involved with the legislation at the beginning. And I will tell you honestly, and if I can say modestly, I think we produced a darn good bill back then in 1980.

It did have one fatal flaw, but it was a flaw that was not of our choosing. That was the fact that it has prohibition against judicial review. It was a conscious decision we made at the time, those of us who were involved in it, that in order to get the law passed we had to have that provision blocking judicial review in there, to do it. The opposition, the bureaucracy, or more accurately as Jere Glover mentioned, the general counsels and so forth of the various agencies, was indeed insurmountable back then and that was the choice we made.

But the bill itself, other than that provision, is a very good bill. As Mike alluded to a couple minutes ago, frankly, it is the model for many of the things we are talking about in this Congress. If you could get a Regulatory Flexibility Act with judicial review in it, it would do a lot of the things we need for small business. And in fact, it would do more for small business than many of the other provisions.

For that reason, we do think it is important that we have a Reg Flex Act. We would love to see it go forward as a freestanding bill, like Jere mentioned and Mike alluded to, that says, this is the message for small business: give us the Regulatory Flexibility Act; let us make it meaningful. I appreciate your concern about the fact that if we have judicial review, what does that mean? Are we going to spend a lot of time in the courts, and the small businesses do not have the money to do it? Are there administrative solutions?

I want to be optimistic. I look at judicial review as an incentive. I think it is an incentive to the agencies to say, look, we have got to comply with this Act. As I was sitting there I was thinking, in the 15 years that I have been doing this I have been trying to think of a time an agency called me up under the Regulatory Flexibility Act and said, "John, we are thinking of proposing this regulation, what do you think about it, which is what the Regulatory Flexibility Act says they are supposed to do, give me a call. I cannot think of a time that an agency has called me and said, "John, we are going to do this to you. We are sitting here with an indoor air quality rules and we are talking about the Family and Medical Leave Act." It just never happened.

But actually, the Regulatory Flexibility Act says that. And it tells them to do other things. It asks them to look for the cumulative impact of regulations. It says that in the Regulatory Flexibility Act. But yet, what is the number one priority of small business today? It is the cumulative impact of regulations on small business. If they had been complying with the Regulatory Flexibility Act for the last decade we would not be in this situation.

But the truth is, it is not the law that is the problem. It is the lack of judicial review. Without that incentive of getting in there and saying, I have got to comply with this, they are just never going to do it. For that reason, we believe we need the judicial review.

A couple other points. Mike mentioned about some of the language in the law that talks about fitting the regulation and the informational requirement to small business. I can tell you, back in the late 1970s there was not a small business in America that was talking about, I want a regulatory analysis. They would rather pay taxes probably. What they thought they were getting was a system that was going to say, yes, what we do for a big business or big labor or big Government or whatever, that does not make sense for you and we have got to find another way.

What has never, never happened under the Regulatory Flexibility Act is the agencies have never said, "darn right it does not make sense for you as small business; we are going to do it a different way." So we can talk about the analysis and that is the procedure to get there, but we are not going to be successful until we get to the point where we recognize the problems of small business and we provide solutions that address those situations for small business.

In the end, no matter what we do, whether we have judicial review or not, if we do not set up a system that allows us to do that, we have not truly accomplished the goal of the Regulatory Flexibility Act.

One last point. The Regulatory Flexibility Act is just half the equation. I want to congratulate the Congress, this committee, and you, Senator, for the unfunded mandates legislation, S. 1, that has passed. We hope that it is quickly going to be resolved because as you know, we have really migrated the burdens upstream. In the 1980s it moved out of the agencies and it came to reside here in Congress. They really became the regulator. They were the ones that were producing legislation here that when it was all done there was not much the agencies could do about it. There was very little latitude for them to produce a flexible regulation.

Now with the unfunded mandates legislation, particularly that provision that says, "Before you are going to pass this darn thing, you are going to take an analysis of what the impact is going to be on the private sector," you are doing to the Congress what the Regulatory Flexibility Act should have done to the agencies. I think if we get a reg flex bill, the unfunded mandates bill, we are doing a whole lot for small business.

With that, I will conclude my remarks and take any questions you would like to ask.

[The prepared statement of Mr. Satagaj follows:]

STATEMENT OF

JOHN S. SATAGAJ, PRESIDENT

OF THE

SMALL BUSINESS LEGISLATIVE COUNCIL

The Small Business Legislative Council (SBLC) appreciates the opportunity to present its views on the Regulatory Flexibility Act (RFA).

The Small Business Legislative Council is a permanent, independent coalition of nearly one hundred trade and professional associations that share a common commitment to the future of small business. Our members represent the interests of small businesses in such diverse economic sectors as manufacturing, retailing, distribution, professional and technical services, construction, transportation, and agriculture. Our policies are developed through a consensus among our membership. Individual associations may express their own views. For your information, a list of our members is enclosed.

Let me begin our statement with the punch line. We are very pleased that the Chairman of the Senate Small Business Committee has chosen the issue of whether judicial review should be permitted under the Regulatory Flexibility Act as his first small business priority in this Congress. S. 350 is a tremendous step forward for small business. As we said in testimony last month before this committee on the future of the Small Business Administration (SBA), not all small businesses have received a loan from the SBA, received management advice from a Small Business Development Center, or availed themselves of procurement assistance, but I can guarantee you all small businesses have encountered government-imposed burdens they found unnecessary and unfair. It is our hope that the Senate would see fit to pass a free-standing RFA amendment bill such as S. 350 as it would send a clear and distinct message on the importance of small business and its unique role in our economy. As we did in the late 1970's, we believe a separate and distinct analysis of the impact of government-imposed burdens on small business is necessary.

In SBLC's letter of invitation for this hearing, the committee asked that our testimony be focused on "the successes and problems that have arisen under the Reg Flex Act." To the best of my recollection, the concept of the Regulatory Flexibility Act and I first crossed paths in early 1979. I hope our long history with this law can shed some light on why we should enact changes in this law.

Looking back on the many intervening years, I must say the most successful day of the law was September 19, 1980, which was the day the law was enacted.

You must remember the context in which the law was enacted. In the early 1970s small business was not a "player." Small business was not even a priority. By the mid-1970s, small business was winning a few battles over tax policy, antitrust policy, and labor law, but in a loose, "ad hoc" way. As the decade progressed, small business began to get its act together and Congress began to recognize and acknowledge the value of the small business sector. References to small business as job creator, innovator, and "engine of the economy" seldom appeared in the Congressional Record before 1978. But soon thereafter, those phrases became a familiar refrain. During the mid to late 1970s, the Office of Advocacy was created, battles to save the Small Business Committee here were won, and a White House Conference was initiated.

We in the small business community seized the opportunity of that moment to "institutionalize" small business' role in public policy making. In relatively quick succession, procurement reform legislation, the Paperwork Reduction Act, Regulatory Flexibility Act, Equal Access to Justice Act, Prompt Pay Act, and the Small Business Innovative Research Act were enacted. From the creation of the Office of Advocacy through the passage of those laws, the clear and common theme was "how do we ensure

that when government undertakes an action, it has considered the impact upon small business and how can we, the small business community, ensure we have input into the process?"

When you read the RFA, I believe you will recognize that it was a farsighted act. Many of the concepts being discussed today as broad-based regulatory reforms are already part and parcel of the RFA. I believe the RFA implemented as written, would offer even more for small business than any other reform measures before Congress. But the RFA is just a few words buried in the United States Code without judicial review. And in the end, the RFA only demonstrates that without discipline, all the good public policy intentions in the world add up to very little.

Hindsight is a marvelous thing.

At the time of the debate over the RFA, the opposition of the "bureaucracy" seemed formidable. Indeed, it appeared insurmountable. I think almost everyone associated with the effort to enact the RFA knew the concession of prohibiting judicial review was a tough price to pay for passage; but on balance, the common belief was having a law in place, however neutered, was better than none. I believe the feeling at the time was the law as enacted would still provide some leverage to accomplish our goals. Under both the Democratic and Republican Administrations, the Office of Advocacy has leveraged the law in useful ways. Nevertheless, by the late 1980s, it was clear that the lack of judicial review was the RFA's proverbial achilles' heel and it would never reach its full potential without changes.

The RFA had its best day in September, 1980, but it has also had many good days thereafter. Through the process of working for, and under this law in the early days of implementation, small business gained credibility. Small business is in no better position today than in 1980, to conduct an

analysis of the impact of public policy on small business. Part of the thinking at the time, behind the creation of the Office of Advocacy and passage of the RFA, was to at least produce the raw analysis using the regulator's own resources, while using the check and balance of Advocacy review, to ensure the analysis was not manipulated. The truth is, we still are unable to conduct the independent quality analysis we would like to see, but the RFA has been successful in providing additional insights into various regulatory proposals over the years. The quality varies greatly from agency to agency and from rule to rule but, nevertheless, some quality analyses have been produced. If the RFA continues to give us some edge, it is because it highlights some issues that we would otherwise miss. It also does give small business an avenue to approach agencies, and we cannot be dismissed out of hand by the agencies.

The Chief Counsel has reported on the specific successes over the years and I defer to those reports for the full history of our progress under the law.

Turning to the other side of the ledger, many of the problems with the RFA are rooted in the decision to preclude judicial review. In 1979 and 1980, we heard all the arguments about the chaos that would ensue if judicial review were allowed, and if the scope of judicial review were unlimited. We conceded and tried it "their" way. What did we get? A law that works sometimes, but on balance one that never lived up to expectations. Now it is time to try to try the other way, and find out whether the law can be all we envisioned it to be.

In that regard, when I think back to the late 1970s, I believe the small business community was most focused on the end product of the RFA, not the process. In that sense, Section 2(b) seemed to sum up what we were all about, "to fit regulatory and informational requirements to the scale of

the businesses..." If one were to search the literature of the day, one would find references to "tiered" regulations and creative alternatives. Small business expected the RFA to produce a regulatory structure that recognized the differences between businesses of different sizes. Therefore, the RFA's greatest failing is it has rarely produced regulations that "fit the regulatory and informational requirements to the scale of the businesses..."

The second significant problem is the analyses required under the law rarely produce the information specified under the law. I cited only one specific provision as an example. Parenthetically, in the context of the overall regulatory reform debate going on today, I submit to you the language was quite prescient. The RFA requires "an identification, to the extent practicable, of the Federal rules which duplicate, overlap, or conflict with the proposed rule." Look at the analyses prepared since 1980 under the RFA. You will not find much discussion of the cumulative impact of regulations on small business. So, what is the most common complaint of small businesses today? The answer is, the cumulative impact of regulatory requirements are strangling them. That is not, of course, the only element of a "theoretical" RFA analysis. But if agencies simply followed the letter of the law with regard to the RFA on that point alone, we may have never gotten to the point we are today with respect to the burdens we have imposed on small business.

The third problem of the RFA is we failed to anticipate the resourcefulness of the Treasury and the IRS. If you asked a small business owner in 1979, why we needed the RFA, the answer would not have been the EPA. It would not have been OSHA. The IRS was number one on the small business community's list of regulatory offenders. Yet, the IRS found a way around the RFA. Although some modest language has been added to the

Internal Revenue Code to facilitate analysis by the Chief Counsel of proposed IRS rules, to this day, the RFA is nothing more than a hiccup to the IRS.

None of these problems can be resolved unless we can force the hand of the agencies to comply. Many of the words necessary to provide true regulatory flexibility are already in place in the RFA. Sad to say, "all" we need is a way to force the agencies to do what the law requires them to do. If there was ever an example of good intentions not being enough, the RFA is certainly that example. When this Congress is done, it is our hope we will have a law that not only requires agencies to do an analysis, but that the quality of the analysis meets the specifications of the law, and that agencies truly produce alternative regulatory solutions that mitigate the adverse impact on small business.

I would be remiss if I did not note that we believe that regulatory burdens are only half the problem. In our view, the regulatory process "migrated" upstream in the 1980s and resided in Congress. The truth is that Congress became the regulator. If you look at many of the laws of the last decade or so since the RFA was enacted, they resemble regulatory schemes more than statements of principle. Congress acquired a bad habit of micromanagement that has to be undone. To make matters worse, Congress regulated in a vacuum, with absolutely no appreciation for the cumulative impact of its action on small business.

For many years, we have argued that Congress should apply the Regulatory Flexibility Act to itself. We testified before this Committee on the concept in 1989. Specifically, we long ago came to believe Congress should undertake a careful economic impact of proposed legislation on small business before Congress votes on the legislation. Therefore, we strongly supported S. 1, the unfunded mandate reform legislation, and are pleased

both Chambers have passed the legislation. To us, the most important element of S. 1 is the requirement that Congress undertake an analysis of the impact on the private sector before considering legislation. We look forward to its enactment.

Enactment of the RFA amendments and unfunded mandates reform legislation would create a "regulatory" environment that will lead to a growing small business sector. We look forward to working with the Committee to secure early passage of S. 350.

Thank you.

Chairman BOND. Thank you very much, Mr. Satagaj. Both you gentlemen, as I indicated, will have your full remarks included in the record.

For a bill, the Reg Flex Act, that has not really had an impact yet, I am very pleased to hear so many claims of fatherhood. Now if we can just get the thing to work.

You think the ultimate hammer of judicial review will be all that will be required for your phones to start ringing and you will be getting inquiries from agencies about how it will affect small business?

Mr. SATAGAJ. I cannot think of a better solution than the judicial review. When we talk about the administrative reviews and mediation and regulations, I have no problem with any of those things. But unless you bring them to court a couple of times, it just does not happen, Senator.

Chairman BOND. It is clear that we are going to get judicial review. But as a lawyer who got out of the business, the prospect of an explosion of litigation is something for which I have a minimum amount of high enthusiasm. I am looking to find, having the ultimate sanction of judicial review, other ways that this can be made workable. You think that just judicial review will get the job done.

Mr. SATAGAJ. I think if the chief counsel's office does have—we talked about in terms of them providing additional guidance and so forth. All of that will fill in the blanks to facilitate the process. But that is all they are. It is just a facilitation of getting from point A to point B. I must tell you, judicial review I believe will do the job.

Chairman BOND. On the subject, do you feel that the questions my colleague from Minnesota was asking, which came from a summary I believe of an analysis provided or recommendations provided by one of your organizations, do you feel that small business associations explicitly should be given the right to proceed in their own name before the courts in this judicial review?

Mr. SATAGAJ. You added an interesting caveat there, in your own name.

Chairman BOND. Mr. Glover said they would do it by the back door.

Mr. SATAGAJ. I think it is an interesting proposal. I feel this way about it. We all know small businesses really do not want to take on the litigation and they do not want the cost of it. My view is, an association is looking to help its members. And the motivation for an association, if it were to get involved, I believe is because its members come to it and say, look, we cannot do this. You have got to do it on our behalf. From that standpoint, I think it is fine.

Am I going out and seeking it? No. Would I do it? Yes. I believe as the Small Business Legislative Council if the law said that associations would have the authority to intervene, we would do so. In fact, it was the Administration's proposal last year that offered up the idea of associations coming into the process.

But that goes to the caveat. You said, in their own name. I do not think an association should go in unless its members are indeed affected by it. So in a sense, the standing is tied to some relationship to the impact on that industry. You just cannot go in be-

cause you are an association. There has to be some basis for you to be able to go into it because of the relationship.

But as I say, even the Administration's proposal had that. I am not promoting it in any proposal that we have. I believe it is not in your bill and, as I say, we support your legislation.

Chairman BOND. Mr. Roush.

Mr. ROUSH. On the same question? It is, I believe, a summary of something that we have circulated a draft of that Senator Wellstone was referring to and not your legislation which I think he might not have quite understood. It is intended, and in fact the legislative language behind that summary does, as John says, speak of associations of aggrieved parties. That is, in order to have standing as an association, your members have to have been aggrieved.

But beyond that, another point I think that needs to be indicated, and I am not exactly certain the answer to this question, but the Regulatory Flexibility Act itself contains three definitions of what a small entity is. One is a small business, one is a small Government, and one is a small organization, a non-profit organization. So I would assume that even the original Act contemplated that at least those small organizations would have standing as small entities.

Now I suspect that probably would not mean NFIB, but I am not 100 percent certain in reading the original Act what that third small entity really was.

Mr. SATAGAJ. And none of the fathers could remember. [Laughter.]

Chairman BOND. We are very pleased to be joined by the distinguished senator from Virginia. Senator, we are asking some questions about the views of the NFIB and the Small Business Legislative Council on the Reg Flex Act. Let me continue with some of those questions.

You understand if we attempt to put in the statute an explicit provision that associations can bring actions, there will be those who question whether others can also. Specifically larger businesses which we do—at least it is not my intention to include large businesses—but large businesses might think that this is an easy way to achieve what they could challenge in their own right if they wish to. How would you answer that? How big a problem do you think that would be?

Mr. ROUSH. I do think it is a potential problem, and the inclusion of that proposal in a draft of just some ideas we circulated, actually as John indicated, originates with the Administration. It is not something that we are wedded to, partly because of what Mr. Glover said.

I think in a sense it does not matter because an aggrieved small business would probably come to its association for backing or support. The small business would take on the case in its own name, but in effect the association would be paying the legal fees perhaps of the aggrieved small business. So in one sense I tend to think it does not matter. Its location in that document stems from the Administration proposal of last year.

Mr. SATAGAJ. I think there are two things, one of which Mike has mentioned is that, (a) you are still going to have to have an aggrieved small business in my opinion.

Chairman BOND. You are going to have to have some kind of standing.

Mr. SATAGAJ. You are going to have to have some standing relating to your membership. And (b), this is different than saying that other businesses should be the basis for the analysis which is in some other proposals. We are saying, if a big business that is a part of an association says, listen, I think I want you to fund this, it is still about the impact on small businesses, not the impact on the big businesses. I think that distinction should be made because there were some proposals out there at one point that said, we are going to expand reg flex to include other businesses.

This, I think is different. We are saying, they may fund it through the association but it still has an analysis on the impact on small business, plus you would have to have standing. I mean, we would certainly like to do it. That is my job is to represent small businesses. I would be happy to come in there and do this thing. But whether we get it or not is not what we live or die on.

Chairman BOND. Let me ask both of you a question about the statute of limitations. Mr. Roush, you mentioned the need for finality. One of the things that we are trying to do is give opportunities but get it over with so if there is going to be a challenge, you know about the challenge. And if there is not a challenge brought then everybody knows they need to comply.

You have indicated one year or perhaps two years. But if we were to provide for a period of pre-notification prior to the publication of the proposed rule, and if we were to adopt the substance of Senator Nickles' bill which says, once you go through the process then it has to come before Congress, at that time, presumably with the comments of the Chief Counsel for Advocacy in the SBA.

Do you think it would be reasonable to go with a shorter statute of limitations, one year or even six months? If you go through all that rigmarole, you want to have some finality to the rules at the time. What strikes you, Mr. Roush, as a reasonable time?

Mr. ROUSH. I think, Senator, given those other hypotheticals and their coming into effect, a year or six months would be fine. I think, however, one of the things that we are trying to achieve, and we invite assistance in trying to achieve this, is some kind of uniformity in the time period, particularly for reviewability under the Regulatory Flexibility Act.

So if it were six months, let us say, I would prefer that the language be something along the lines that said, notwithstanding any other review period in the law, for the purposes of the reg flex review you have six months. For example, OSHA has something I believe like 60 days in which you have to file for judicial review, and some acts have as little as 30, and some have 10. Some have longer, but it is all over the board.

I feel, and I have been told by many small businesspeople that the hodge-podge of different dates and the shortness of most of them is something that they just cannot cope with. So if it were to go to six months, I would urge that the language say something

like, notwithstanding any other provision of law for purposes of the reg flex. . . .

Chairman BOND. Mr. Satagaj.

Mr. SATAGAJ. I think the finality is a very important point. I am always reluctant to concede any argument of my opponent, but I think if they have one of value, it is not the number of lawsuits that we would file under the judicial review but the need for finality.

I believe amongst small businesses, ultimately when you have made a decision here in Congress that this is the law and you have told the agency, go forward with it, at some point the small business owner wants to turn away from complaining about the law to complying with the law. Ultimately, they just want to get on with business. Okay, you have made your decision. This is what it is. This is what you told me I have to do. Now just let me go on with my business, make the adjustments and move forward.

So for that reason, I favor a very modest period of time in order to get the finality. Let us move on. We have had our shot, let us move forward.

Chairman BOND. Let me ask one last question. Mr. Satagaj, you cite a provision in the Reg Flex Act that requires, "an identification to the extent possible of the Federal rules which duplicate, overlap, or conflict with a proposed rule." I just would invite you to share with the committee your views about the cumulative impact on these regulations and the particular provision that I just cited that you mentioned.

Mr. SATAGAJ. As I said in my testimony, I think it is the failure of the agencies to do that that has led us to the point where indeed we do have the cumulative impact to small businesses. Mike and I hear this every day. You hear the business owner tell you, look, I am not even going to tell my kids to get in the business any more. Why should I do this? Why should I pass on this business? You have got to do this, this, this, and this.

I can remember in 1989 we were testifying before this committee and the issues were, we were talking about things on minimum wage, and we were talking about adding this benefit and that benefit, the mandated health care. You add all these things together and, whammo, the next thing you know they all add up. During the debate on each one of those things you heard it said it is only $200 billion here, it is only $300 billion. To the business owner it is not that. It is X number of dollars on the payroll and they all add up.

I cannot share with you any other insight except to say that that is the one thing that is driving people nuts. There is just more and more of it. I cannot get a handle on it. I cannot deal with it. Get rid of it. That is why the unfunded mandate legislation, as I say, at the legislative level begins to address that issue as well.

Chairman BOND. Mr. Roush.

Mr. ROUSH. Just to underline what John is saying. I hear from my members that they believe they are under siege by the Federal Government on the regulatory front. Regulations are their fastest growing problem and are currently tied with taxes in national surveys of our membership as the number one problem. Federal Government regulations were something like 11th five years ago, 11th or 12th. They have moved up the list dramatically.

The cumulative effect has just hit all of the sudden. If you look at a list of the private sector mandates that were passed in the 1970s and 1980s and the beginning of the 1990s, and then compare that to what happened over the first part of the century, it is amazing. Almost nothing the first part of the century compared with what has happened in the 1980s. It is all of the sudden just hitting.

So this is extremely important. That is why I try to emphasize that regulatory reform and reg review, reg analysis, reg flex, et cetera, are so important to small businesspeople. The cumulative effect of regs has just all of the sudden started to crash over on top of them.

Chairman BOND. Senator Warner.

Senator WARNER. It looks like the Republican majority got here just in time.

Chairman BOND. Any questions that you have?

Senator WARNER. I support your measure, Mr. Chairman. I would simply ask, so that the record reflects this, is there any other alternative besides judicial review to get your results?

Mr. ROUSH. I share John's point of view that it is probably the easiest, most direct, quickest, most final solution. There does seem to me a possibility of another way but I have not worked it out as to how to actually do it. Jere Glover sort of said it when he was testifying. That is, you need to cause pain to the agency. I am trying to figure out a way to take money out of the agency. They perform an analysis——

Chairman BOND. You are looking for an appropriations——

Mr. ROUSH [continuing]. And the first time they screw up they lose something. The second time they screw up they lose more. But I do not know how you can do that constitutionally.

Senator WARNER. Somehow we have got to bring back into balance the role of Government to help. And I judge from what you say that it has gone way beyond help and is carrying too many people over a cliff and they are losing incentive.

Of course, it is interesting, I started my professional life primarily in the legal field. Lawyers are being scrutinized now, and I think quite properly, about the litigious society we are in. Mr. Chairman, do you suppose we are adding to that litigious society?

Chairman BOND. That is one of the questions that I raised with our witnesses. They think the ultimate club of judicial review, the frightening prospect of being hauled back into court——

Mr. ROUSH. Could I just elaborate perhaps? Because we share the concern about the litigious society. The House is involved this very week in civil justice reform. We are up to our eyeballs in that.

The distinction I would draw here though is, this is us, the citizens, suing the Government. I almost do not care if there is more of that. It is not citizens suing citizens, or the Government suing the citizens. It is us suing the Government for redress.

Senator WARNER. How do the small businesses afford litigation unless you are going to help subsidize it?

Mr. ROUSH. What may in fact happen, an association may subsidize or a collective group of small businesses may get together. And not all small businesses, not even all of our members are so poor that they could not do it on their own. But they would have to cross a pretty high threshold to undertake the cost; there is no

doubt about it. In fact, I think that high threshold of cost, to some extent, mitigates the concern that you have about there just being a rush to sue, because this is a small business provision after all.

Senator WARNER. I thank the witnesses. I thank you, Mr. Chairman.

Chairman BOND. Thank you, Senator Warner.

Mr. Roush, I would caution you when you say how great it is for the citizens to sue the Government. Some of the worst outrages that we have are where groups have sued the Federal Government and the Federal Government has taken a fall and agreed to consent decrees which enable Government agencies sometime to enact far more stringent restrictions on the citizenry at large than they would ever be able to get through the legislative and regulatory process. Senator Abraham is working on measures dealing with the friendly consent decrees. I think those are a great problem.

But to summarize much of what we said, I think that you have been driving at the overall concern that we have. That is, that for too long, particularly in the small business area, congressional oversight has been an oxymoron. We have forgotten to look at what we have done and to see how it works. That is not to say that it is all bad or it is all good.

But I would hope that through the Reg Flex Act, by providing a hammer, we would have a more significant impact on assuring that in advance we take account of possible undue burdens. But that will never relieve the obligation of Congress to look back in oversight and to see how these laws that we passed are actually being carried out.

It is my hope that this committee can continue to be a forum for discussion, and raising with the authorizing committees, those areas where some of Congress' best ideas either have gone astray, or have been driven astray, or taken astray by the regulatory process. To me, that is one of the great contributions we might be able to make beyond the statutory enactment.

Gentlemen, I thank you for your testimony. This hearing is concluded.

[Whereupon, at 11:09 a.m., the Committee was adjourned.]

APPENDIX MATERIAL SUBMITTED

II

104TH CONGRESS
1ST SESSION

S. 350

To amend chapter 6 of title 5, United States Code, to modify the judicial review of regulatory flexibility analyses, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 2 (legislative day, JANUARY 30), 1995

Mr. BOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend chapter 6 of title 5, United States Code, to modify the judicial review of regulatory flexibility analyses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Regulatory Flexibility Amendments Act of 1995".

SEC. 2. JUDICIAL REVIEW OF REGULATORY FLEXIBILITY ANALYSES.

(a) AMENDMENT.—Section 611 of title 5, United States Code, is amended to read as follows:

"§ 611. Judicial review

"(a)(1) Except as provided in paragraph (2), not later than 1 year after the effective date of a final rule with respect to which an agency—

"(A) certified, pursuant to section 605(b) of this title, that such rule would not have a significant economic impact on a substantial number of small entities; or

"(B) prepared final regulatory flexibility analysis pursuant to section 604 of this title,

an affected small entity may petition for the judicial review of such certification or analysis in accordance with the terms of this subsection. A court having jurisdiction to review such rule for compliance with the provisions of section 553 of this title or under any other provision of law shall have jurisdiction to review such certification or analysis.

"(2)(A) Except as provided in subparagraph (B), in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period provided in paragraph (1), such lesser period shall apply to a petition for the judicial review under this subsection.

"(B) In the case where an agency delays the issuance of a final regulatory flexibility analysis pursuant to section

608(b) of this title, a petition for judicial review under this subsection shall be filed not later than—

"(i) 1 year; or

"(ii) in the case where a provision of law requires that an action challenging a final agency regulation be commenced before the expiration of the 1-year period provided in paragraph (1), the number of days specified in such provision of law,

after the date the analysis is made available to the public.

"(3) For purposes of this subsection, the term 'affected small entity' means a small entity that is or will be adversely affected by the final rule.

"(4) Nothing in this subsection shall be construed to affect the authority of any court to stay the effective date of any rule or provision thereof under any other provision of law.

"(5)(A) In the case where the agency certified that such rule would not have a significant economic impact on a substantial number of small entities, the court may order the agency to prepare a final regulatory flexibility analysis pursuant to section 604 of this title if the court determines, on the basis of the rulemaking record, that the certification was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(B) In the case where the agency prepared a final regulatory flexibility analysis, the court may order the agency to take corrective action consistent with the requirements of section 604 of this title if the court determines, on the basis of the rulemaking record, that the final regulatory flexibility analysis was prepared by the agency without complying with section 604 of this title.

"(6) If, by the end of the 90-day period beginning on the date of the order of the court pursuant to paragraph (5) (or such longer period as the court may provide), the agency fails, as appropriate—

"(A) to prepare the analysis required by section 604 of this title; or

"(B) to take corrective action consistent with the requirements of section 604 of this title,

the court may stay the rule or grant such other relief as it deems appropriate.

"(7) In making any determination or granting any relief authorized by this subsection, the court shall take due account of the rule of prejudicial error.

"(b) In an action for the judicial review of a rule, any regulatory flexibility analysis for such rule (including an analysis prepared or corrected pursuant to subsection (a)(5)) shall constitute part of the whole record of agency action in connection with such review.

"(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of enactment of this Act, except that the judicial review authorized by section 611(a) of title 5, United States Code (as added by subsection (a)), shall apply only to final agency rules issued after the date of enactment of this Act.

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OPENING STATEMENT OF SENATOR DALE BUMPERS
COMMITTEE ON SMALL BUSINESS
MARCH 8, 1995

I want to commend Senator Bond for convening this hearing to consider S. 350, a bill he recently introduced to provide for judicial review of determinations under the Regulatory Flexibility Act. The Reg Flex Act, as it is commonly called, is one of the most important and least known pieces of legislation Congress has ever enacted for the benefit of small businesses. The reason for its low profile is the lack of effective means to force federal regulators to take the purposes of Reg Flex as seriously as they were intended by Congress.

Let me say just a few words by way of background. Regulatory reform is one of 1995's hula-hoops. It is part of the battle cry of Republicans in the House, and it has spawned several bills which range from thoughtful efforts to outrageous effrontery. This bill, however, predates most of the people who now serve in the House Republican majority. For several years in this Committee, our former colleague from Wyoming, Senator Wallop -- a man with whom I had more differences than similarities -- carried the torch of judicial review under the Reg Flex Act. Last Fall, several of us committed to Senator Wallop -- albeit under some duress -- that we would continue to pursue this issue this year. That commitment is now being kept, as it should be, and this very legitimate issue if finally receiving the attention it deserves.

The Reg Flex Act states a simple and noble principle: Federal agencies should consider the special needs and problems facing small businesses and other smaller entities as those agencies conduct the rulemaking process. If a significant number of businesses are to be effected substantially by the rule, the agency should consider whether special means should be implemented or made available to smaller concerns, bearing in mind the obvious -- that small firms do not have armies of lawyers, clerks and accountants to help with federal paperwork and other regulatory requirements.

The simplicity of this purpose belies the difficulty which departments have had in meeting it. Some agencies, unhappily, do not care much about small business, as the Chief Counsel for Advocacy's regular reports to Congress have told us for years.

This bill or one similar to it will pass this year, I fervently believe. For the first time, small businesses will be able to use the federal judiciary to hold accountable those agencies which have simply thumbed their noses at the Reg Flex Act and at Congress as well. At the

same time, however, let me say that some of the bills being considered in the House will not pass, or they will only after many months of arduous, nonstop debate. What some House Republicans have proposed in the name of small business and in the name of Reg Flex are simply shameless and outrageous power grabs on behalf of big business.

One leading House member has proposed allowing suits under Reg Flex by small businesses and "other businesses." "Other businesses" is a positively Orwellian way of saying that the largest, the richest, and the most powerful corporations in America are equally entitled to the special consideration which Congress has mandated for small businesses under the Reg Flex Act. This proposal, I fear, does not bode well for any dealings we may have with the House this Congress. It raises the question whether we will have Large Business Set Asides contracts and Large Businesses eligible for SBA loans. Of course, no one would be so crass as to call them by those names; we'll probably call them "other businesses."

This is the most patent example of the reverse-Robin Hood philosophy that seems to pervade the work of the other body. Even as we speak, the House is considering ways to restrict the rights of injured people to sue for damages for their injuries, while the same House members propose new ways for the biggest and richest corporate fat cats to sue the taxpayers in the person of Uncle Sam under the guise of Reg Flex. It is a disguise which will not work.

The Clinton Administration should be commended for its support -- the first from any Administration ever -- for allowing small entities to seek redress for the grievances in the Federal Courts. Former Administrator Bowles and former Acting Chief Counsel Doris Freedman deserve especially good marks for getting this issue before the National Performance Review early-on. I am sure, however, that the aforementioned House bill would be as unacceptable to the Administration as it is to me personally. Having said all that, I hope this Committee will continue to work toward responsible Reg Flex reform and other legitimate and meaningful regulatory reforms.

OPENING STATEMENT OF SENATOR CONRAD BURNS
COMMITTEE ON SMALL BUSINESS
MARCH 8, 1995

Thank you, Mr Chairman, for convening this hearing on an extremely important issue to many small businesses. Congress has put federal regulations in the spotlight, and I appreciate the Small Business Committee's efforts in looking at their effects on small businesses.

Federal regulations plague many small businesses in the United States and in my home state of Montana. The Regulatory Flexibility Act, which was passed in 1980, was supposed to protect small businesses from unfair and onerous federal regulations. But too often federal agencies simply ignore the Act even as they write more regulations.

Chairman Bond's measure, The Regulatory Flexibility Amendments Act, gives small businesses the right to file suit in federal court to force compliance with the Regulatory Flexibility Act. In other words, it would put teeth in the Act and allow small businesses the right to fight back against non-compliance by federal agencies.

The Reg-Flex Act is one of the few laws that doesn't include judicial review of agency compliance. Chairman Bond's measure would change that by making compliance with the Act subject to judicial review.

Small businesses deserve the full protection accorded to them under the Reg-Flex Act, and I applaud the Chairman's efforts on their behalf.

Congress also needs to fix what is wrong with the Reg-Flex Act. We should not stop at locking the barn after the horse gets out. There should be safeguards put into the Reg-Flex Act to enforce Agency compliance before proposed regulations become final.

The inherent costs and time involved in a federal court case are so demanding that a small business should only have to resort to taking an agency to federal court for non-compliance as the absolute last step.

The SBA Advocate's Office doesn't have a chance of keeping up against the onslaught of federal regs. And as the SBA's Office of Advocacy and small businesses have learned, the threat of Congressional hearings does little to thwart the flood of regulations.

Federal regulations hit small businesses in every sector of our economy. I am holding a hearing this Saturday in Kalispell, Montana, to look at the adverse effects of federal regs on the logging industry in Montana and throughout the West. If OSHA had been more careful in writing these particular regulations this hearing would not have been necessary.

Many of the provisions were sloppily written, unnecessary, and in several cases, downright dangerous. One would force an employer to ensure that employees' private vehicles be properly maintained if they are used to get to off-road sites. I know that everyone present can relate numerous tales of nightmarish federal regulations.

The Regulatory Flexibility Amendments Act would correct the lack of judicial review in the Reg-Flex Act. This is a good step, and I encourage the Committee to continue to look at the Reg-Flex Act.

I look forward to learning more this morning about Senate Bill 350. I also appreciate the witnesses coming today to share their concerns about the Reg-Flex Act and how to fix what is wrong with it to the benefit of small businesses.

Thank you, again, Mr. Chairman for holding this hearing.

OPENING STATEMENT OF SENATOR LARRY PRESSLER
COMMITTEE ON SMALL BUSINESS
MARCH 8, 1995

I thank Chairman Bond for calling this important hearing on the Regulatory Flexibility Amendments Act of 1995.

Federal regulations cost businesses and government approximately $200 billion a year. This expense represents a greater percentage of our nation's economic output than that of any other industrial economy. Bureaucrats certainly do not contrive regulations our of spite for small businesses. Administrators promulgate regulations out of a perceived need. At the same time, such regulations often affect small businesses unfairly and unnecessarily. Some regulations are good. Some clearly are frivolous and damaging.

How, then, do we separate the two?

Given an enforcement mechanism, the Regulatory Flexibility Act will do this. Congress has a serious opportunity to enact measures aimed at giving regulators a real reason to consider proposed regulations' impact on small businesses. Congress has a rare opportunity to give small businesses the leverage they need to make known their concerns.

I commend the chairman for introducing S. 350, The Regulatory Flexibility Act Amendments Act of 1995. I have long been a supporter of legislation to strengthen the Regulatory Flexibility Act.

In fact, I cosponsored similar legislation in the 103rd congress with Senator Malcolm Wallop. Unfortunately, it was not adopted. I understand S. 350 contains a judicial review provision similar to that of the legislation we considered last year. This is important. Without judicial review, the Regulatory Flexibility Act has no teeth. Small businesses need a tool to ensure federal agencies adhere to the Regulatory Flexibility Act. Judicial review is just such a tool.

We cannot underestimate the importance of this issue to small businesses. The small business community literally has spelled out its concerns over regulatory burdens. Participants in the White House conference on Small Business in my home state of South Dakota -- and across the nation -- have recommended that federal agencies roll back the tide of regulations.

It is time for us to respond.

Again, I thank the Chairman and I look forward to the testimony of today's witnesses.

THE HONORABLE JERE GLOVER, CHIEF COUNSEL, OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION

Responses to questions posed by Senator Pressler
Hearing on the Regulatory Flexibility Amendments Act
March 8, 1995

Q: Mr. Glover, in your testimony you express reluctance at the prospect of the National Federation of Independent Business (NFIB) bringing the Office of Advocacy into regulatory negotiations. It would seem such a policy would prevent unnecessary court battles. Might there not be some way to mitigate possible ill-effects while still curbing the need for judicial review?

A: The Office of Advocacy was less than supportive of NFIB's idea for two reasons. First, it provided no mechanism for resolving the negotiations. Having endless rounds of negotiations would not be in the best interests of small businesses. They prefer regulatory certainty and an open-ended negotiation process does not yield certitude. Second, the Office of Advocacy does not have the resources to conduct the type of negotiations contemplated by the NFIB proposal. And given these times of extreme budgetary restraint, it is unlikely that the funds for such resources will be available in the near future.

I agree that it would be preferable to resolve regulatory disputes without resorting to litigation. Congress could mandate that the Office of Management and Budget (OMB) prohibit the publication of any rule until the concerns of the Office of Advocacy are addressed. While that would dramatically reduce potential litigation with respect to most executive branch agencies, the OMB does not have authority over independent regulatory agencies[1] and is prohibited by appropriation riders from expending funds in overseeing the Agricultural Marketing Service. Thus, some agencies would not be subject to effective oversight by the OMB. As a result, judicial review remains the potent weapon in ensuring RFA compliance.

Q: How do you feel about small business organizations having standing in the judicial review process?

A: I do not object to small businesses having standing to contest agency compliance with the RFA. The RFA was designed to help small business and it would be odd, indeed, to deny them standing.

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[1] Congress could give the OMB oversight over independent regulatory agencies. However, as it did with the Paperwork Reduction Act, Congress would have to provide a mechanism to enable the independent regulatory agency to override a decision of OMB. Absent such a provision, the courts would likely consider the legislation unconstitutional. *Cf.* Humphrey's Executor v. United States, 295 U.S. 602, 628-30 (1935) (President has only limited authority to replace Commissioner of Federal Trade Commission.

Q: I believe allowing small business organizations to have standing for judicial review has merit. I also feel it may be useful for small businesses with a similar concern to form an ad hoc group that also would have standing. Do you think it is possible to allow both types of groups to have standing and still avoid unnecessary litigation?

A: Both types of organizations would have standing under current judicial interpretations of the constitutional requirements for standing. Affording these entities standing is unlikely to lead to increased litigation because litigation is expensive and small businesses, whether singly or as part of a group, are unlikely to fund litigation unless the regulations acts as a serious detriment to their business.

Q: Which of the General Accounting Offices's suggestions can be addressed on the administrative level and which will Congress have to address?

A: The Office of Advocacy and the OMB have already undertaken the GAO recommendation to work together. The GAO recommendation concerning that the Office of Advocacy and the OMB jointly develop criteria for implementing the RFA can be done by Executive Order. However, it is unclear whether that would apply to all agencies or just Executive Branch agencies. Certainty would only come from an Act of Congress. The final GAO recommendation, increasing the authority of the Office of Advocacy to interpret the RFA, would require an Act of Congress.

JOHNNY C. FINCH, ASSISTANT COMPTROLLER GENERAL,
GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE

Response to question posed by Senator Pressler
Hearing on the Regulatory Flexibility Amendments Act
March 8, 1995

Q: Which of the General Accounting Office's suggestions can be addressed on the Administrative level and which will Congress have to address?

A: Congress will have to address our suggestions involving amendment of the Regulatory Flexibility Act to clarify SBA's authority to interpret the Act's provisions and to require SBA to develop criteria as to whether and how federal agencies should conduct regulatory flexibility analyses. Although SBA and OMB have indicated they are already taking action in this area, congressional action to clarify SBA's authority and responsibility would support this effort and remove any questions regarding the basis of those voluntary efforts. Also, since OMB's authority to provide enforcement of the Act's requirements does not extend to regulations issued by the independent regulatory agencies or agricultural marketing orders, Congress will have to focus its oversight in those areas.

The other actions we recommended -- establishment of procedures within OMB to determine agencies' compliance with the Act and SBA notification of OMB regarding agencies' noncompliance with the Act -- can be taken by the agencies without congressional action. In fact, OMB and SBA have indicated that they are already taking these actions.

DAVID VOIGHT, DIRECTOR OF THE SMALL BUSINESS CENTER,
UNITED STATES CHAMBER OF COMMERCE

Responses to questions posed by Senator Pressler
Hearing on the Regulatory Flexibility Amendments Act
March 8, 1995

Q: I believe allowing small business organizations to have standing for judicial review has merit. I also feel it may be useful for small businesses with a similar concern to form an ad hoc group that also would have standing. Do you think it is efficient to allow for this?

A: The U.S. Chamber of Commerce agrees that individual small businesses need to be supplemented in their ability to exercise their right to judicial review of federal agency adherence to the "Regulatory Flexibility Act of 1980." However, we believe that this goal could be more efficiently accomplished by expanding the definition of "affected small entity" in the legislation to include not-for-profit membership associations, such as ours, as well as the Chief Counsel for Advocacy of the Small Business Administration. Many membership associations watch federal agency actions closely and have existing staff and resources to respond when agencies fail to adhere to administrative rules. For example, the Chamber's National Chamber Litigation Center routinely involves itself in litigation representing the interests of the business community. With these existing structures in place, backed by the Chief Counsel for Advocacy, the interests of small entities would be well represented.

Q: Mr. Voight and Mr. Satagaj, are each of your organizations in agreement with NFIB's suggested changes to the Regulatory Flexibility Act?

A: The U.S. Chamber of Commerce supports strengthening the Regulatory Flexibility Act as much as possible. To the extent that Congress and the Administration are willing to accept NFIB's changes, we believe they should be given every consideration. However, central to the Chamber's membership is the issue of a strong judicial review provision. Our members are demanding that agencies be held accountable for failure to follow the rules just as they are penalized for failure to dot every "i" and cross every "t".

Q: We are familiar with the chicanery the Internal Revenue Service uses to avoid the Regulatory Flexibility Act. What other agencies do members of your organizations cite for ignoring the spirit of the Act.

A: The most common complaint we have heard is about the Department of Labor. Most recently, we heard about the DoL's handling of the Family and Medical Leave Act regulations which we cited in our testimony. With respect to other agencies, we would refer to the GAO's April, 1994 report on federal agency compliance with the Regulatory Flexibility Act of 1980. I might point out here that most of our small members are unaware whether or not an agency has complied with the Regulatory Flexibility Act. They have neither the staff, time, or resources to follow these proceedings in the Federal Register. They do know, however, which federal agencies they have the most trouble dealing with, and I suspect their experiences parallel the level of attention paid to the Regulatory Flexibility Act by the agencies. In addition to DoL, our members most commonly cite the Environmental Protection Agency and the Internal Revenue Service as causing the biggest regulatory burdens they face.

91-017 O - 95 - 4

MICHAEL O. ROUSH, DIRECTOR OF SENATE FEDERAL GOVERNMENTAL AFFAIRS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Responses to questions posed by Senator Pressler
Hearing on the Regulatory Flexibility Amendments Act
March 8, 1995

Q: I believe allowing small business organizations to have standing for judicial review has merit. I also feel it may be useful for small businesses with a similar concern to form an ad hoc group that also would have standing. Do you think it is efficient to allow for this?

A: Yes.

Q: We are familiar with the chicanery the Internal Revenue Service uses to avoid the Regulatory Flexibility Act. What other agencies do members of your organizations cite for ignoring the spirit of the Act?

A: Almost all of them at one time or another. The most recent report of the Chief Advocate on compliance with the RFA has a good discussion of which agencies are most creative in their avoidance of the spirit and intent of the Act.

COMMENTS FOR THE RECORD

JOHN T. SPOTILA
GENERAL COUNSEL

UNITED STATES SMALL BUSINESS ADMINISTRATION

Thank you for inviting me to submit these remarks on behalf of the Administration concerning current efforts to strengthen the Regulatory Flexibility Act (the Reg Flex Act).

As a former small business owner, and current General Counsel at the Small Business Administration, I have a strong appreciation for the cumulative burdens imposed upon small business owners by government regulations. I have had to deal personally with costly recordkeeping, reporting, and substantive requirements, so I know firsthand about paperwork and compliance burdens. Small business owners are creating jobs in this economy. It is vitally important that regulatory agencies consider the impact on small entities of their proposed rules and then minimize adverse effects as much as possible.

For all these reasons, I was very pleased in 1993 when the National Performance Review, under the direction of Vice-President Gore and with substantial involvement from our current Administrator at SBA, Philip Lader, strongly endorsed the idea of adding a right of judicial review to the Reg Flex Act. At the specific direction of Erskine Bowles, then our SBA Administrator (and now Deputy Chief of Staff for the President), I spent a considerable amount of time last year working with others in the Administration to try to implement that recommendation. Jere Glover, who serves as SBA's Chief Counsel for Advocacy, and who is testifying before you today, has been a strong ally and partner in that endeavor. We both very much want to see the prompt

passage of a free-standing Reg Flex judicial review provision which benefits small entities in three ways: by encouraging better regulations, by affording access to the courts for relief, and by not bogging people down in a lot of unnecessary litigation.

Last October, President Clinton reiterated his personal support for strong judicial review of Reg Flex determinations. He wants a provision which will give meaningful redress to small business owners and other small entities. Today, on his behalf, I reaffirm the Administration's support for this important small business initiative (copies of his letter, of similar letters from Leon Panetta and Philip Lader, and of the National Performance Review recommendation, are attached to my testimony).

As you know, the Reg Flex Act was designed to ensure that federal regulating agencies carefully weigh the effects of their rules on small entities. During the past two years, at the direction of the President and Vice-President, and with the assistance of Sally Katzen, as head of the Office of Information and Regulatory Affairs, and of Jere Glover, as Chief Counsel for Advocacy, federal regulators have improved their compliance with the Reg Flex Act. Real progress has been made, and it has occurred in the context of a broad Administration commitment to regulatory reform, with growing sensitivity to the special concerns of the small business community.

On September 30, 1993, President Clinton issued Executive Order No.

12866, on "Regulatory Planning and Review". In an effort to streamline the regulatory process and reduce unnecessary regulatory burdens, he called upon OIRA and all federal agencies to develop innovative regulatory approaches, encourage meaningful public participation in the regulatory process, consider the cumulative impact of their actions and engage in better long-range planning.

At the SBA, we took this guidance seriously and immediately began working to implement the President's directives. In cooperation with OIRA, we initiated a coordinated interagency effort to identify, recommend and implement regulatory reforms that would be of particular benefit to small business. The Department of Labor, Department of Transportation, Department of Justice, Food and Drug Administration, Environmental Protection Agency, and Internal Revenue Service all joined us in this endeavor from the beginning, with the Food Safety Inspection Service of the Department of Agriculture and the ICC adding their support once we got underway.

At a unique public Forum on March 17, 1994, senior representatives from SBA, OIRA, and the six participating agencies pledged to work together in a serious manner to fulfill the President's goal of meaningful reform. They formed interagency working groups to examine the effects of regulation on five distinct industries: chemicals and metals, restaurants, food processing, trucking, and environmental disposal and recycling services. The IRS formed a sixth working group which focused on tax-related

issues affecting all of the designated industries.

Each working group met numerous times over a period of months to consider comments and suggestions from 150 small business owners and 80 agency personnel. When the working groups issued their findings in July, they included some 140 recommendations which now are being evaluated and, in many cases, implemented by the participating agencies. Agencies like EPA, OSHA, and the IRS, which traditionally may not have been well thought of by small business owners, have been particularly cooperative and energetic in expanding their outreach to the small business community and considering suggestions for reform.

Our experience with this interagency effort has direct relevance to your inquiry into a possible strengthening of the Reg Flex Act. We found surprising consensus among small business owners from every business sector and every part of the country. They did not tell us that the air is too clean or their workplaces too safe. They did not say that we should stop inspecting meat or making sure that airplanes are safe. They did say that they want early and continuous involvement in regulatory development, better access to regulatory information, and an emphasis on compliance assistance rather than harsh enforcement. They want us to eliminate paperwork, streamline forms, and get rid of unjustified regulations. When it comes to the Reg Flex Act, they want the right to seek judicial review of agency decisions, but most of all they want the agencies to do a

better job of developing regulations so that they won't have to bother with litigation to protect their interests. Many seem not to trust the agencies at the moment, so they are looking to Reg Flex reform as a way to assure that agencies consider the interests of small business when they make decisions about regulations. They do not want their own interests subordinated to the self-interest of big business competitors.

President Clinton and Vice-President Gore are aware of these sentiments and clearly hear what small business owners are saying. Just two weeks ago, on February 21st, they called upon all federal regulators to cut obsolete regulations, reward results (not red tape), get out of Washington to listen more and create grass roots partnerships, and negotiate with the regulated community (rather than trying to dictate to it). Previously, even without new Reg Flex legislation, they had directed all of the agencies in their Administration to comply in good faith with the procedures set forth in the Reg Flex Act. Jere Glover, in his role as Chief Counsel for Advocacy, and Sally Katzen, as the head of OIRA, have agreed in writing to work together to ensure agency compliance with the Reg Flex Act administratively. By working together, they believe they can help increase the level of agency compliance, so that it becomes less necessary for small business owners even to consider bringing litigation to seek judicial review.

But any administrative approach is very dependent on the particular individuals involved in the effort and the resources available to them. Individuals come

and go. There is a risk that some federal agency in the future might disregard its obligation in this area. The President and Vice President believe, as I do, that the objectives of the Reg Flex Act are too important to be ignored. Accordingly, I reiterate their strong support for passage of a strong, carefully drafted, free-standing judicial review provision.

The challenge in adding a right to seek judicial review lies in crafting language that will give small entities meaningful relief while not requiring them to spend a lot of time and money in litigation. Most small business owners want no part of litigation. What they want, instead, are better regulations. In this context, they want a judicial review provision that is clear and complete, encouraging sound regulatory development and giving proper guidance to all concerned so that lawsuits are needed only if and when regulators ignore their Reg Flex obligations.

With these guiding principles in mind, we would like to suggest, respectfully, that the Committee consider the following points in evaluating proposals to strengthen the Reg Flex Act.

(1) The Reg Flex Act properly focuses on protection for small entities. It should not require agencies to perform regulatory flexibility analyses for "other businesses" as well. This changes the emphasis of the underlying statute and

would force agencies to divert scarce resources that could be better employed in striving to protect small entities. Nor should it give large entities the right to initiate "Reg Flex" litigation over regulatory approaches that meet the particular needs of small business.

(2) To the extent possible, clear guidance should be given in any new legislation so that small entities do not find themselves involved in continuing litigation over the scope, nature and timing of review. This would impose extra costs upon them and might lead to results less favorable to small entities than the proponents of judicial review intended. In this regard, we favor the approach reflected in S. 350, as introduced, which specifies a time limit for bringing actions for judicial review, clarifies the standard of review, and reminds small entities that courts will be relying on the administrative record in considering any petition for review. It is important that small entities be encouraged to file comments with the regulatory agency during the rulemaking stage since such comments will help the agency issue better rules in the first place. We also agree that the statute should make it clear when, and to what extent, relief can be given if the courts find that an agency has not complied with the Reg Flex Act. Certainly, the courts should be given broad power to hold up implementation of a rule or grant other appropriate relief if an agency fails to bring its actions into compliance, but they should not be asked to substitute their own judgment for that of the regulating agency as to the substantive nature of a particular rule.

(3) We also agree that the Reg Flex Act properly focuses its attention on the development of final rules by regulating agencies. If small entities are to have the right to seek court review of an agency's compliance with the Reg Flex Act, it is entirely appropriate that such actions be limited to the review of certifications or Reg Flex analyses prepared for final rules. It makes very little sense to tie up the courts with litigation over proposed rules or such other matters as 10-year plans or regulatory agenda.

(4) We also agree that it would be a mistake to extend the scope of the Reg Flex Act to an assessment of the "indirect effects" of proposed regulations. It is very difficult to assess these effects with any degree of accuracy. Even agencies that proceed in good faith may be drawn into litigation because of the ambiguity of the statutory language. Instead of giving small entities meaningful protection by requiring agencies to concentrate on mitigating the direct effects of what they propose to do, we end up diverting attention and encouraging wasteful litigation.

We believe that there is substantial bipartisan agreement on how to improve the Reg Flex Act. The President strongly favors prompt passage of a meaningful Reg Flex judicial review provision. He appreciates how important this proposal is to small business and other small entities. We would be happy to work with you on this important legislation and look forward to its passage.

THE WHITE HOUSE

WASHINGTON

October 8, 1994

Honorable Malcolm Wallop
United States Senate
Washington, D.C. 20510

Dear Senator Wallop:

My Administration strongly supports judicial review of agency determinations under the Regulatory Flexibility Act, and I appreciate your leadership over the past years in fighting for this reform on behalf of small business owners.

Although legislation establishing such review was not enacted during the 103rd Congress, my Administration remains committed to securing this very important reform. Toward that end, my Administration will continue to work with the Congress and the small business community next year for enactment of a strong judicial review that will permit small businesses to challenge agencies and receive meaningful redress when agencies ignore the protections afforded by this statute.

As you know, the National Performance Review endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small business, states, and other entities are reduced.

Again, thank you for your continued leadership in this area.

Sincerely,

Bill Clinton

THE WHITE HOUSE

WASHINGTON

October 7, 1994

The Honorable Malcolm Wallop
United States Senate
Washington, D.C. 20510

Dear Senator Wallop:

Your particular question about the Administration's position on judicial review of actions taken under the Regulatory Flexibility Act has come to my attention.

As you have discussed with Senator Bumpers, the Administration supports such judicial review of "Reg Flex."

The Administration supports a strong judicial review provision that will permit small businesses to challenge agencies and receive meaningful redress when they choose to ignore the protections afforded by this important statute.

In fact, the National Performance Review endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small business, states, and other entities are reduced.

Ironically, Phil Lader, our nominee for Administrator of the Small Business Administration (whose nomination was voted favorably today by a 22-0 vote of the Senate Small Business Committee) has been a principal champion of judicial review of "Reg Flex." In his capacity as Chairman of the Policy Committee on the National Performance Review, Phil vigorously advocated this position. I know that, if confirmed, as SBA Administrator, he would join us in continued efforts to win Congressional support for such judicial review.

Sincerely,

Leon E. Panetta
Chief of Staff

cc: Senator Bumpers
Senator Pressler
Senator Nunn
Senator Thurmond
Senator Hollings

October 8, 1994

Honorable Malcolm Wallop
United States Senate
Washington, DC 20510

Dear Senator Wallop:

The Administration supports strong judicial review of agency determinations under the Regulatory Flexibility Act that will permit small businesses to challenge agencies and receive strong remedies when agencies do not comply with the protections afforded by this important statute.

In fact, the National Performance Review publicly endorsed this policy to ensure that the Act's intent is achieved and the regulatory and paperwork burdens on small businesses, states, and other entities are reduced.

As Chairman of the Policy Committee of the National Performance Review, under Vice President Gore's leadership I vigorously advocated this position. I have continued to champion this policy within the Administration.

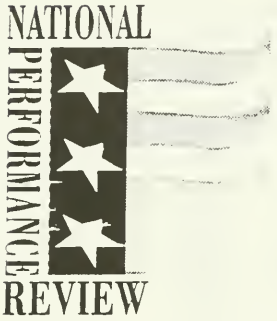
If confirmed as Administrator of the U.S. Small Business Administration, I will join the Congress and the small business community in continued efforts to pass legislation for such judicial review.

Thank you for your leadership on this important issue to small business.

Sincerely,

Philip Lader
Administrator-Designate
U.S. Small Business Administration

Small Business Administration



Accompanying Report of the
National Performance Review
Office of the Vice President
Washington, DC

September 1993

SBA01: Allow Judicial Review of the Regulatory Flexibility Act

NATIONAL PERFORMANCE REVIEW

Background

Small businesses often feel overwhelmed by well-intentioned regulations that burden them with needless costs. Congress and the President recognized this problem in 1980 and enacted the Regulatory Flexibility Act (RFA). The RFA requires agencies to seek alternative regulatory solutions when their rules have a disproportionately severe impact on small entities, including small businesses and nonprofit organizations and relatively small government jurisdictions. However, most agencies have failed to perform the required RFA analysis. Rules continue to be issued even though the harm that resulted could have been alleviated had they been examined according to RFA guidelines.

For example, in 1986, Congress enacted the Emergency Planning and Community Right-To-Know Act, requiring local reporting of hazardous chemicals. The initial Environmental Protection Agency (EPA) implementation instructions required reporting "any amount" of hazardous chemicals. The potential impact on small business was staggering. Even hot-dog stands would have been required to report bottles of solvent or metal polish.

The Small Business Administration's (SBA's) Office of Advocacy, which is directed by law to monitor compliance with the RFA, coordinated small business comments with EPA, which explored less burdensome alternatives. As a result of this process, EPA raised the threshold for reporting to 10,000 pounds of hazardous chemicals. This threshold eliminated hundreds of thousands of unnecessary reports, yet still covered more than 95 percent of the total quantity of stored chemicals and 100 percent of those in quantities likely to produce the sort of hazard that was the concern of the legislation.

The RFA, which works in conjunction with the fundamental agency rulemaking law, the Administrative Procedure Act (APA), leads rulemakers to one of two outcomes:

(1) For rules that will have a significant economic impact upon a substantial number of small entities, the agency is required to perform a regulatory flexibility analysis. This analysis defines the burdens of the rule and examines alternatives that will lessen those burdens for small entities.

(2) For rules that will not have a significant economic impact upon a substantial number of small entities, the agency must so certify, with a brief statement explaining the rationale behind this conclusion.

While SBA's Office of Advocacy can ask agencies to follow the RFA, no mechanism for enforcing compliance exists. As a result,

federal agency compliance is spotty at best. A few agencies, such as the EPA, the Food Safety Inspection Service, and the Nuclear Regulatory Commission, now consistently use the RFA to reduce the regulatory burden imposed on small entities. Most agencies employ simplistic analysis that barely meet even the minimal requirements of the RFA. Others, including the Internal Revenue Service, define their rulemaking activities in the *Federal Register* as "interpretative, a category excluded from RFA responsibilities."

Several administrative efforts have been made to improve the level of responsiveness to the RFA, but with little success. The fundamental solution is judicial review, an approach favored by small business. Such review is permitted for agency rulemaking under the APA. However, the RFA itself prohibits judicial review of agency compliance with the RFA. Courts have further restricted the use of RFA analysis as evidence in suits brought under the APA.

For the RFA to succeed at its goal of avoiding needless government regulatory burdens on small entities, sanctions for noncompliance with the RFA must be created.

With judicial review, small entities could challenge an agency's failure to perform an RFA review or a flawed RFA review. They could sue in the appropriate federal court and, if they won, the court could order the agency to explain its RFA determination or develop appropriate alternatives under the RFA. A credible threat of lawsuits would give agencies a strong motive to ensure that the RFA is followed.

Judicial review is supported by all major small business associations, including the American Small Business Association, the American Trucking Association, the National Association for the Self-Employed, the National Association of Manufacturers, the National Federation of Independent Business, National Small Business United, the National Society of Public Accountants, the Small Business Legislative Council, and the U.S. Chamber of Commerce.[2]

To create better compliance with the RFA and avoid needless lawsuits, the availability of judicial review must be accompanied by systematic compliance guidelines for agencies concerning how to conduct RFA reviews. For more than a decade, most agencies have failed to develop such guidelines on their own.

Actions

1. The Regulatory Flexibility Act of 1980 should be amended to allow for judicial review of agency determinations under the RFA.[3]

This approach would allow small entities that have been injured by an agency action to seek judicial relief. This would be possible only after an agency has published a final rule, not at any earlier point in the rulemaking process.

2. An Executive Order should be issued requiring the SBA Office of Advocacy to issue governmentwide guidance on appropriate processes for complying with the analytical requirements of RFA.[4]

This approach would provide consistent technical guidance—the foundation for avoiding lawsuits.

Implications

The potential for judicial review would give agencies greater incentive to meet their present statutory obligations to consider the impact of their rules on small entities. Agency lawyers would ensure that the agency would properly comply with the RFA to avoid the valid threat of litigation.

Judicial review is not expected to lead to a large number of lawsuits.[5] No basis for suits would exist if agencies conducted an appropriate RFA review. As a practical matter, most regulations to which small entities have significant objections are already in litigation; judicial review of RFA would at

most add another ground to these challenges. A few new cases based solely on RFA failure might result, in instances in which the impact of rules on small entities is sufficiently negative to impose greater costs than the cost of litigation—a fairly high threshold. In these rare cases, a challenge may be in the nation's best interests.

In the most extreme cases, judicial review of RFA could lead to an initial flurry of lawsuits. Once the first few cases are decided, however, the boundaries between acceptable and unacceptable agency behavior under RFA would become well-known to agency attorneys and the administrative law bar. After that, legal challenges could be expected to fall off dramatically.[6]

Both the process for developing SBA guidance and the guidance itself would help achieve compliance with the RFA. The notice, comment, and public hearings phase would raise the level of awareness in federal agencies about the RFA. Furthermore, the Office of Advocacy expects that the guidance ultimately developed will provide agencies with a map sufficiently detailed to allow them to navigate their way through the RFA with minimal effort.

The RFA does not impose a requirement for an agency to collect additional data except in rare instances in which data originally collected was insufficient to understand the problem the rule was trying to solve.[7] In such cases, the additional task of information collection should not be attributed to the RFA but to an agency's failure to meet its obligations for reasoned decision-making.

Fiscal Impact

Judicial review of the RFA imposes no costs outside the government. In rare cases where there is no court challenge of regulations on grounds other than the RFA and the cost of unnecessary or overly burdensome regulations is greater than the cost of litigation, small entities may choose to incur the cost of bringing suit based solely on an RFA violation. The cost to these entities cannot be estimated but would be seen by them as a net savings.

Procedures to implement the RFA would be limited to federal agencies. The costs inside the federal government are difficult to estimate because the costs of rulemaking are not a line item and are generally not well-measured. The best estimates available suggest a maximum average of one work day per rule when there is no substantial impact on small entities, a total effort that should be absorbed in the current personnel ceiling.[8] Over the years, SBA has found that only 30 to 50 rules a year have significant negative impact on small entities.

If agencies do not comply with RFA, costs for litigation would certainly accrue. The marginal cost of RFA suits cannot be calculated in advance. Additional funds should not be budgeted for such costs.

Endnotes

1. See annual reports on the implementation of the Regulatory Flexibility Act, U.S. Small Business Administration, Office of Advocacy, 1981-1992.
2. U.S. Congress, House Committee on Small Business, testimony of James Morrison, July 28, 1993. The organizations listed are the Regulatory Flexibility Act Coalition, which supports judicial review of RFA.
3. Judicial review can be established with the following language: (a) Section 611 of title 5, United States Code is amended by striking subsections (a), (b), and (c) and inserting a new subsection (a): "For purposes of section 702 of title 5, determinations made pursuant to this chapter shall only be reviewable upon publication or service of a rule as required by section 553(d) of title 5."
4. Implementing instructions for complying with the analytical requirements in sections 603, 604, and 605 of the RFA can be brought about by the following executive order: "The Small Business Administration Office of Advocacy shall: Issue guidance to federal agencies for the implementation of the Regulatory Flexibility Act. Such guidance shall be developed after consultation with affected agencies and after such public hearings as may be appropriate. The guidance will be designed to ensure that the analysis conducted under the Act provide data and reasonable alternatives." This approach was used successfully in 1977 to provide a framework for all federal agencies in meeting the requirement to examine environmental impacts of federal actions mandated by the National Environmental Policy Act of 1969 (NEPA). This approach was tested in the Supreme Court, and has been favorably commented on by that court several times. Such guidance would help agencies defend their actions in any legal challenges under the RFA.

National Association for the Self-Employed

STATEMENT OF

MR. BENNIE L. THAYER

The National Association for the Self-Employed appreciates the opportunity to submit this statement for the March 8, 1995 hearing before the Senate Small Business Committee on S. 350 -- the Regulatory Flexibility Amendments Act of 1995. This statement is submitted for the hearing record by Bennie L. Thayer, the NASE President.

The NASE represents over 320,000 small business persons from throughout the United States. Over 85 percent of the NASE members are business owners with 5 or fewer employees. The membership represents a very wide range of businesses, notably in the consulting and retail fields. My association is one of the founding groups of the Regulatory Flexibility Act Coalition, a broad coalition of 57 small business and small governmental associations. Altogether, the Coalition represents more than 5 million small businesses and over 13,000 small local governments.

Small Business and Regulatory Reform

We commend Chairman Bond for his introduction of S. 350 and his long-standing support for making the Regulatory Flexibility Act subject to judicial review. S.350 is an excellent response to the enormous paperwork and recordkeeping burdens small business persons face as a result of a federal regulatory process that is out-of-control.

In addition to my current position as the NASE President, I have been a small business person all of my adult life. I completely understand what it means to be over-regulated and buried in a sea of paperwork. I used to own a 7-Eleven franchise on 13th Street, N.E. in Washington, D.C. Between the IRS and the franchisor, it seemed as if I spent all my time doing paperwork. My wife and I were managing fine with the store, paying our taxes, complying with regulations and keeping the government happy -- or so we thought. When the time came for us to sell our store, the IRS told us that we owed $55,000 in back taxes. If you ask the average business owner which federal agency contributes the most to regulation and paperwork burdens, the answer will usually be the IRS.

When I began Diversified Concepts, Inc., I became acutely aware that I had a new "partner" I hadn't anticipated, OSHA. DCI was a small business that specialized in trophies, plaques, and screenprinting. For the screenprinting alone, there were numerous regulations on how to store, move and dispose of the solutions we utilized. I was forced to buy one special machine to dump the used solution into, as I was not allowed to dump it down the sink. Since the solutions used in screenprinting are also flammable, you could count on a visit every other month from the Fire Marshall. Now, I understand the importance of safety but sometimes I think even OSHA gets carried away. With my current business Lightcom International, a small telecommunications firm, I have acquired yet another partner -- the Federal Communications Commission.

Broad-based Congressional Support for RFA Reform

Chairman Bond and other Senators displayed outstanding leadership in 1994 on the issue of judicial review of the RFA. In particular, sixty-seven Senators voted last year in favor of an RFA amendment as part of S. 4, the Senate version of the National

Competitiveness Act. Also, 380 House members voted last year to support a nonbinding resolution calling for approval of the RFA provisions of S. 4. We were also pleased to see that the Clinton Administration lent its support in 1994 to strengthening the RFA, as well as by Vice President Gore in his Reinventing Government Task Force.

This support is a welcome reminder of the backing the Regulatory Flexibility Act has long enjoyed. Introduced in the Senate in 1977 by Senators John Culver (D-IA) and Gaylord Nelson (D-WI), the RFA was unanimously reported and passed by the Senate late in 1978. In 1979, the bill was introduced and championed in this Committee by Rep. Bob Kastemmeier (D-WI). It enjoyed wide bipartisan backing in both chambers. It was a top recommendation of President Carter's White House Conference on Small Business in January, 1980 and was passed overwhelmingly by Congress and signed into law by President Carter later that year.

The Regulatory Flexibility Act has enjoyed strong support because it is a responsible approach to a very real problem. Every member of Congress has heard the vigorously expressed concerns of small business and small government constituents regarding federal regulations and paperwork. Federal agencies that comply with the RFA properly can go a long way toward addressing that public concern -- yet can do so without compromising their missions or their legal obligations. For members of Congress, the Act can provide a channel for turning constituent complaints about "the bureaucracy" into constructive solutions.

But to accomplish this, the RFA must be a law Congress and constituents can depend on. Unfortunately, that has become less true over time. Change is needed.

How the Regulatory Flexibility Act Is Designed to Work

The Regulatory Flexibility Act is designed to address a very significant problem. The drafters of regulations normally find it simpler to promulgate "one-size-fits-all" regulations, as opposed to taking the time to analyze whether different rules should apply to different segments of the population. Of course, regulating everyone in exactly the same way is sometimes the right thing to do. Rules of general applicability are sometimes necessary to protect public health and safety, for example. But because regulators find such uniform rules more administratively convenient, they may be inappropriately used. In many instances such inflexible rules can violate common sense, simple fairness and economic efficiency. The Regulatory Flexibility Act addresses a particularly troubling aspect of "one-size-fits all" rulemaking -- the misapplication of uniform rules to small businesses, small non-profit organizations and smaller jurisdictions of government. The RFA tells rule writers to think about the effects of their actions on these "small entities". Whenever possible and consistent with their underlying legislative mandates, the rulemakers should seek alternatives that are less burdensome for these small entities.

The most obvious reason why doing this is sound public policy is that these "smaller entities" may not be the sources of the problems the agencies are trying to address in the first place. For example, using RFA analyses, the Environmental Protection Agency has been able to identify small businesses which do not create health or environmental problems, and

exempt those businesses from the requirements imposed on other, larger businesses which do create health and environmental problems. Scores of EPA regulations have been structured in this way.

A second reason why agencies should weigh their regulatory impacts on small entities is that small entities typically lack the resources and in-house expertise to do so themselves. Indeed, small entities very often are unaware of pending regulations. Even when small entities do comment on proposed rules, they tend to do so without help from the kind of attorneys, accountants, economists, and compliance specialists that larger entities can afford.

The key economic problem is the disproportionate costs involved. Rules which impose the same costs on everyone work a special hardship on small entities because small entities must spread those costs over fewer employees, fewer units of production, fewer taxpayers and smaller revenues. Thus, rules imposing identical expenditures on large and small entities tend to raise costs more for the small. One Small Business Administration study suggests that, on average, small businesses pay three times more per employee than big businesses to comply with the same regulations.

The RFA also helps because the public interest is enhanced whenever agencies write sound regulations that are the result of reasoned analysis and an open process of public notice and comment. Both regulatory reasoning and public input can be improved by using the RFA. This improved information, in turn, can help agencies use their limited resources more efficiently by designing regulations that can be complied with and that devote the most attention and resources to the most serious problems.

To help achieve its purpose, the Act empowers the SBA Office of Advocacy to receive proposed and final regulations, to comment on rules, to seek enforcement of the RFA within the federal government, and to file *amicus curiae* briefs in judicial proceedings involving rules impacting small business.

What the Regulatory Flexibility Act Does Not Do

It is important to note what the RFA does *not* do. It does not specify what rules an agency may or may not write. It does not override an agency's substantive legal responsibilities. Above all, it does not tell an agency what its rules should say. Section 606 of the RFA explicitly states that the RFA's analysis requirements "... do not alter in any manner standards otherwise applicable by law to any agency action." As with the rest of the Administrative Procedure Act, of which it is a chapter, the RFA specifies procedures which must be followed -- nothing more, nothing less.

The Need to Revise the RFA

Unlike the rest of the Administrative Procedure Act, and indeed, unlike virtually every other statute agencies must observe, the RFA severely restricts judicial review. Section 611(b) states that the Regulatory Flexibility analyses prepared under the Act shall not be subject to judicial review -- but then goes on to say that these analyses do constitute part of

the agency's rulemaking record, which a court may examine. This murky reasoning has led to judicial confusion in interpreting the statute. This in turn has meant that the many agencies sincerely attempting to comply with the RFA have had little judicial guidance in interpreting the statute. Worse, it has led to an apparent belief on the part of some agencies that compliance with the RFA is entirely voluntary.

The most frequently encountered agency violations of the RFA -- the kind one finds in any copy of the *Federal Register* -- are these:

- proposed or final rules which omit any mention of the RFA;
- rules which assert a lack of impact on small entities, but offer no reason for this assertion;
- agency claims of broad exemptions from the RFA; and
- rules which acknowledge an impact on small entities, without any accompanying efforts to lessen that impact or explain why doing so would not be feasible.

Other testimony presented to the Committee may document a large number of specific agency compliance problems, ranging from unjustified waivers under Section 605(b) of the Act to the blanket exemption claimed by the Internal Revenue Service. The following are two specific examples of problems in this context.

Item 1. "Section 89"

In 1988, the Internal Revenue Service proposed new regulations under Section 89 of the Internal Revenue Code. These regulations would have dealt with tests and data collection required of businesses to prove nondiscrimination in employee benefit plans. In the opinion of many in the small business community, as well as SBA's Office of Advocacy and a number of members of Congress, the objectives of Section 89 could have been met with far fewer paperwork and compliance burdens on small business than the IRS was proposing. However, the IRS maintains that virtually all of its rules are "interpretative" and therefore completely exempt from the RFA. So substantive comments and recommendations made by members of Congress, the small business community and the Office of Advocacy to the IRS for reducing the small business burden of the Section 89 regulations were ignored. Yet a judicial challenge under the RFA was not possible. The IRS' decision to press forward with the regulations as proposed led to the rapid emergence of a national grassroots movement to strike down Section 89. Congress was forced to intervene, and the issue mushroomed into a bitter election-year battle involving six Congressional committees, thousands of constituent visits and millions of pieces of mail. In the end, Section 89 was repealed altogether. It is not too much to say that if the IRS has conscientiously applied the RFA, or if the threat of judicial review of the RFA had been available, the entire episode could have been avoided.

Item 2. The Review of Existing Regulations

Section 610 of the RFA requires every agency to review its existing rules over a ten-year period, beginning with the effective date of the Act, and to delete or simplify those rules which impose unnecessary burdens on small entities. The deadline for this occurred on

January 1, 1991 -- that is, 4 years ago. To date, not one agency has fully complied with this legal requirement. Not one. Not even the SBA. Most agencies have not put a single regulation through this ten-year review.

As these items, and the other evidence before the Committee should suggest, a major problem exists with RFA compliance. The normal mechanism for forcing compliance with a law is the threat, or reality, of a lawsuit. This has not been possible with the RFA. The existing judicial review formulation in the Act, Section 611(b), simply has not worked. The courts are confused about what it means, individual agencies feel free to excuse themselves from the law at will, and every single agency of the federal government has ignored a major provision of the statute over the last fourteen years.

Judicial Review of the RFA

By providing for judicial review under the RFA, the NASE views S. 350 as striking at the very heart of the problem small business persons face with the current RFA law. That is, S. 350 is designed to ensure a strengthening in federal agency compliance with the law. Small businesses do not typically have the resources to sue federal agencies; they are unlikely to do so except in extraordinary cases. But the threat of judicial review, even if remote, could vastly improve the seriousness with which the RFA is treated by the agencies and therefore the effectiveness of the law in solving the national problem to which it is addressed. Perhaps there is another way, besides judicial review, to permanently and effectively deter agency non-compliance. If so, the small business community would be happy to consider it. But so far we have not heard of such an alternative. And it is surely striking that virtually every other law governing agency administrative procedures deters non-compliance through the threat of judicial review.

Having stated this, it is important to note that unlimited judicial review is not the NASE's goal. We do not seek interlocutory review, as was granted in agency rulemakings under the National Environmental Policy Act (NEPA). We are more than willing to work with Congress in shaping careful legislative language on judicial review, to prevent the RFA from being abused. But any proposal for revision of the RFA which leaves intact the current gridlock on judicial review will not be acceptable to the NASE. Congress must not condone continued agency flaunting of this Act.

It is possible that an initial flurry of lawsuits could be filed under the RFA after judicial review is permitted. If so, it would likely be a short-lived phenomena. Once the courts render their first round of decisions regarding acceptable and unacceptable agency conduct, and once those boundaries are well understood by the administrative law bar, such cases would probably diminish sharply. Both agency general counsels and plaintiffs attorneys would understand how much discretion the courts would be willing to allow the agencies. And both could be expected to respect those boundaries. There are, of course, sanctions which the courts employ against the flag of frivolous lawsuits.

Judicial review of RFA is not likely to lead to excessive litigation or a "clogging of the courts." Small businesses and governments simply do not have the time and resources to sue

federal agencies over anything less than egregious violations. Attorneys want to avoid risking the reprimands or fines resulting from filing trivial federal lawsuits, and the federal courts themselves are not willing to waste their own time on inconsequential matters.

Of importance, even greater fears about excessive litigation were expressed when another small business related law, the Equal Access to Justice Act, was passed at about the same time the RFA was. When the Equal Access to Justice Act was enacted to simplify the award of attorney's fees, a flood of lawsuits was expected. This simply did not happen.

The original estimates suggested that Equal Access to Justice cases would cost the federal government over $100 million a year in legal fees alone. In 1991, federal agencies had a total adjudication case load of over 390,000. From this total adjudication case load, only 48 Equal Access to Justice applications were granted, at a cost of about $433,000. Of about 130,000 federal civil cases tried under relevant statutes that year, EAJA applications were granted in 253 cases at a total cost of $1.2 million. Both figures combined are significantly lower than the initial $100 million projection. Therefore, we believe that granting judicial review to the RFA will not result in an influx of law suits.

Another potential check on judicial review which the Committee might wish to explore is authorizing the Office of Advocacy to assist other agencies in drafting their procedures for RFA compliance. (This could be similar to the role EPA performs now in assisting other agencies as they draft their environmental compliance procedures.) An agency which then followed the Office of Advocacy-approved RFA procedures could use Advocacy's approval as a defense in court.

Indirect Effects of Rules

Another crucial improvement that is necessary to make the RFA function properly, in the NASE's view, is getting agencies to assess indirect as well as direct consequences of rules. It is not simply the effect of individual rules in isolation which burden small entities, but the cumulative effect of all rules. Agencies need to be far more sensitive to the reporting and compliance requirements already imposed on small entities as they consider new requirements. Agencies also need to understand that a rule which threatens the viability of a small business' suppliers or customers, or a small government's tax base, also threatens that small business or small government. To be more aware of these indirect effects, agencies should develop their own in-house pictures of the populations they regulate and should work closely with the SBA Office of Advocacy, to make use of its data bases.

Advance Notification of Rulemakings

The requirement, under Section 602 of the RFA, for agencies to provide Advocacy with regulatory agendas, so as to allow Advocacy to anticipate rulemakings, has not worked properly. The agendas have not been produced in a timely manner, and the descriptions of planned rulemakings often have been vague or inaccurate. This problem is not entirely the fault of the agencies. Six-month advance agendas by their nature are often tentative. Priorities change, legislation changes, sudden needs arise. One approach to remedying this

problem is to require agencies to provide the Office of Advocacy with advanced notification of *specific* rulemakings. This problem, too, deserves Congress' attention if the RFA is to be fully effective.

Amicus Rights of the Office of Advocacy

The filing of amicus curiae briefs by the Office of Advocacy in selected legal cases is necessary, not only to give "moral" assistance to beleaguered individual small businesses, but to alert the courts to cases where key questions of principle are at issue. That is why Congress took the extraordinary step, in Section 612(c) of the Act, of *directing* the Courts to accept such an intervention by the Office of Advocacy. Yet no such *amicus* brief has ever been filed by the Office of Advocacy. The NASE recommends that Congress reassert its intent with respect to this matter. Whether through this "sense of the Congress" approach or some other, it is imperative that the Office of Advocacy understand and carry out its full responsibilities under the RFA.

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